IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No.3401 of 2003

with

CIVIL APPLICATION No.4094 of 2003(in SCA No.3401/2003)

with

SPECIAL CIVIL APPLICATION No.1475 of 2003

with

CIVIL APPLICATION No.3580 of 2003(in SCA No.1475/2003)

with

SPECIAL CIVIL APPLICATION No.916 of 2003

with

SPECIAL CIVIL APPLICATION No.936 of 2003

with

SPECIAL CIVIL APPLICATION No.5228 of 2003

To

SPECIAL CIVIL APPLICATION No.5241 of 2003

with

SPECIAL CIVIL APPLICATION No.6053 of 2003

with

CIVIL APPLICATION No.3533 of 2003(in SCA No.6053/2003)

with

SPECIAL CIVIL APPLICATION No.5246 of 2003

with

SPECIAL CIVIL APPLICATION No.5688 of 2003

with

SPECIAL CIVIL APPLICATION No.6128 of 2003
with
CIVIL APPLICATION No.4562 of 2003(in SCA No.6128/2003)
with
SPECIAL CIVIL APPLICATION No.6319 of 2003
with
SPECIAL CIVIL APPLICATION No.6425 of 2003
with
SPECIAL CIVIL APPLICATION No.6449 of 2003
with
SPECIAL CIVIL APPLICATION No.6464 of 2003
To
SPECIAL CIVIL APPLICATION No.6471 of 2003
with
SPECIAL CIVIL APPLICATION No.6498 of 2003
with
SPECIAL CIVIL APPLICATION No.6503 of 2003
with
SPECIAL CIVIL APPLICATION No.6504 of 2003
with
SPECIAL CIVIL APPLICATION No.6512 of 2003
with
SPECIAL CIVIL APPLICATION No.6634 of 2003
with
SPECIAL CIVIL APPLICATION No.6645 of 2003
with
SPECIAL CIVIL APPLICATION No.6681 of 2003
with
SPECIAL CIVIL APPLICATION No.6684 of 2003
with
SPECIAL CIVIL APPLICATION No.6687 of 2003
with
SPECIAL CIVIL APPLICATION No.6728 of 2003
with
SPECIAL CIVIL APPLICATION No.6860 of 2003
with
SPECIAL CIVIL APPLICATION No.6861 of 2003
with
SPECIAL CIVIL APPLICATION No.6983 of 2003
with
SPECIAL CIVIL APPLICATION No.7029 of 2003
with
SPECIAL CIVIL APPLICATION No.7174 of 2003
with
SPECIAL CIVIL APPLICATION No.8045 of 2003
with
SPECIAL CIVIL APPLICATION No.8755 of 2003
with
SPECIAL CIVIL APPLICATION No.8894 of 2003
with
SPECIAL CIVIL APPLICATION No.7108 of 2003

with
CIVIL APPLICATION No.3910 of 2003(in SCA No.7108/2003)
with
SPECIAL CIVIL APPLICATION No.8737 of 2003
with
SPECIAL CIVIL APPLICATION No.8739 of 2003
with
SPECIAL CIVIL APPLICATION No.2779 of 2003
with
SPECIAL CIVIL APPLICATION No.6962 of 2003
with
SPECIAL CIVIL APPLICATION No.2758 of 2003
with
SPECIAL CIVIL APPLICATION No.7139 of 2003
with
SPECIAL CIVIL APPLICATION No.3845 of 2003
with
SPECIAL CIVIL APPLICATION No.6790 of 2003
with
SPECIAL CIVIL APPLICATION No.8033 of 2003
with
SPECIAL CIVIL APPLICATION No.6997 of 2003
with
CIVIL APPLICATION No.3581 of 2003(in SCA No.6997/2003)
with
SPECIAL CIVIL APPLICATION No.8437 of 2003
with
SPECIAL CIVIL APPLICATION No.6686 of 2003
with
SPECIAL CIVIL APPLICATION No.8322 of 2003
with
SPECIAL CIVIL APPLICATION No.8035 of 2003
with
CIVIL APPLICATION No.3907 of 2003(in SCA No.8035/2003)
with
SPECIAL CIVIL APPLICATION No.5395 of 2003
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SPECIAL CIVIL APPLICATION No.6830 of 2003
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SPECIAL CIVIL APPLICATION No.9891 of 2003
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SPECIAL CIVIL APPLICATION No.9884 of 2003
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SPECIAL CIVIL APPLICATION No.7643 of 2003
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SPECIAL CIVIL APPLICATION No.9514 of 2003
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SPECIAL CIVIL APPLICATION No.4772 of 2003
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SPECIAL CIVIL APPLICATION No.9888 of 2003
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SPECIAL CIVIL APPLICATION No.7199 of 2003
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SPECIAL CIVIL APPLICATION No.6963 of 2003
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SPECIAL CIVIL APPLICATION No.6761 of 2003
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SPECIAL CIVIL APPLICATION No.7901 of 2003
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SPECIAL CIVIL APPLICATION No.7902 of 2003
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SPECIAL CIVIL APPLICATION No.8481 of 2003
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SPECIAL CIVIL APPLICATION No.8484 of 2003
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SPECIAL CIVIL APPLICATION No.6461 of 2003
with
SPECIAL CIVIL APPLICATION No.8097 of 2003
with
SPECIAL CIVIL APPLICATION No.8098 of 2003
with
SPECIAL CIVIL APPLICATION No.5668 of 2003
with
SPECIAL CIVIL APPLICATION No.2129 of 2003
with
CIVIL APPLICATION No.2506 of 2003(in SCA No.2129/2003)
with
SPECIAL CIVIL APPLICATION No.2130 of 2003
with
CIVIL APPLICATION No.2509 of 2003(in SCA No.2130/2003)
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SPECIAL CIVIL APPLICATION No.8937 of 2003
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SPECIAL CIVIL APPLICATION No.9360 of 2003
with
SPECIAL CIVIL APPLICATION No.5991 of 2003
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SPECIAL CIVIL APPLICATION No.6815 of 2003
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SPECIAL CIVIL APPLICATION No.6945 of 2003
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SPECIAL CIVIL APPLICATION No.6946 of 2003
with
SPECIAL CIVIL APPLICATION No.6938 of 2003
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SPECIAL CIVIL APPLICATION No.6947 of 2003
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SPECIAL CIVIL APPLICATION No.7995 of 2003
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SPECIAL CIVIL APPLICATION No.3266 of 2003
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SPECIAL CIVIL APPLICATION No.3267 of 2003

with
SPECIAL CIVIL APPLICATION No.7196 of 2003
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SPECIAL CIVIL APPLICATION No.7112 of 2003
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SPECIAL CIVIL APPLICATION No.3268 of 2003
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SPECIAL CIVIL APPLICATION No.8614 of 2003
with
SPECIAL CIVIL APPLICATION No.8036 of 2003
with
SPECIAL CIVIL APPLICATION No.7002 of 2003
with
SPECIAL CIVIL APPLICATION No.8034 of 2003
with
SPECIAL CIVIL APPLICATION No.6275 of 2003
with
SPECIAL CIVIL APPLICATION No.7114 of 2003
with
SPECIAL CIVIL APPLICATION No.2786 of 2003
with
SPECIAL CIVIL APPLICATION No.2783 of 2003
with
SPECIAL CIVIL APPLICATION No.6823 of 2003
with
SPECIAL CIVIL APPLICATION No.7457 of 2003
with
SPECIAL CIVIL APPLICATION No.7650 of 2003
with
SPECIAL CIVIL APPLICATION No.8139 of 2003
with
SPECIAL CIVIL APPLICATION No.8494 of 2003
To
SPECIAL CIVIL APPLICATION No.8497 of 2003
with
SPECIAL CIVIL APPLICATION No.3787 of 2003
with
SPECIAL CIVIL APPLICATION No.9382 of 2003
with
SPECIAL CIVIL APPLICATION No.9421 of 2003
with
SPECIAL CIVIL APPLICATION No.3099 of 2003
with
SPECIAL CIVIL APPLICATION No.6755 of 2003
with
SPECIAL CIVIL APPLICATION No.6988 of 2003
with
CIVIL APPLICATION No.4563 of 2003(in SCA No.6988/2003)
with
SPECIAL CIVIL APPLICATION No.3846 of 2003
with

CIVIL APPLICATION No.3905 of 2003(in & with SCA No.6961/2003)
with
SPECIAL CIVIL APPLICATION No.6470 of 2003
with
CIVIL APPLICATION No.3906 of 2003(in SCA No.6470/2003)
with
SPECIAL CIVIL APPLICATION No.7958 of 2003
with
SPECIAL CIVIL APPLICATION No.4441 of 2003
with
SPECIAL CIVIL APPLICATION No.4463 of 2003
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SPECIAL CIVIL APPLICATION No.4472 of 2003
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SPECIAL CIVIL APPLICATION No.7003 of 2003
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SPECIAL CIVIL APPLICATION No.8119 of 2003
with
SPECIAL CIVIL APPLICATION No.8128 of 2003
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SPECIAL CIVIL APPLICATION No.6471 of 2003
with
CIVIL APPLICATION No.3909 of 2003(in SCA No.6471/2003)
with
SPECIAL CIVIL APPLICATION No.5072 of 2003
with
SPECIAL CIVIL APPLICATION No.606 of 2003
with
SPECIAL CIVIL APPLICATION No.6948 of 2003
with
SPECIAL CIVIL APPLICATION No.6950 of 2003
with
SPECIAL CIVIL APPLICATION No.6973 of 2003
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SPECIAL CIVIL APPLICATION No.6974 of 2003
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SPECIAL CIVIL APPLICATION No.6975 of 2003
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SPECIAL CIVIL APPLICATION No.6976 of 2003
with
SPECIAL CIVIL APPLICATION No.7005 of 2003
with
SPECIAL CIVIL APPLICATION No.9882 of 2003
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SPECIAL CIVIL APPLICATION No.9887 of 2003
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SPECIAL CIVIL APPLICATION No.9886 of 2003
with
SPECIAL CIVIL APPLICATION No.9889 of 2003
with
SPECIAL CIVIL APPLICATION No.6796 of 2003

with

SPECIAL CIVIL APPLICATION No.9919 of 2003

with

SPECIAL CIVIL APPLICATION No.2016 of 2003

with

CIVIL APPLICATION No.4743 of 2003(in SCA No.2016/2003)

with

SPECIAL CIVIL APPLICATION No. 10060 of 2003

with

SPECIAL CIVIL APPLICATION No. 10061 of 2003

with

SPECIAL CIVIL APPLICATION No.5059 of 2003

with

CIVIL APPLICATION No.3373 of 2003(in SCA No.5059/2003)

with

SPECIAL CIVIL APPLICATION No.10331 of 2003

with

SPECIAL CIVIL APPLICATION No.10332 of 2003

with

SPECIAL CIVIL APPLICATION No.10333 of 2003

with

SPECIAL CIVIL APPLICATION No.10336 of 2003

For Approval and Signature:

Hon'ble MR.JUSTICE JAYANT PATEL

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : YES

APEX ELECTRICALS LTD. and others

Versus

ICICI BANK LTD. and others

CORAM : MR.JUSTICE JAYANT PATEL

Date of decision: 30/07/2003

CAV JUDGEMENT AND ORDER

1. In all these petitions challenge is made by the concerned petitioners to the action taken by the concerned respondent Bank or Financial Institution, as the case may be, under the Act. In majority of the cases the action under challenge is at a stage of issuance of notice under Section 13(2) of "The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002"(hereinafter referred to as "the Act"), requiring the borrower, by notice in writing, to discharge full liabilities of secured creditors. Only in few cases which shall be dealt with at the appropriate stage there is challenge to other actions of Bank in addition to the action for challenging the notice. The challenge is also to the action of the Bank of taking steps under Section 13(4) of the Act of either sealing secured assets and/or for taking possession of the secured assets. It is also an admitted position that as per the information supplied to the Court that none of the petitioners has approached Debt Recovery Tribunal (hereinafter referred to as "DRT") against the action of the Bank under Section 13(4) of the Act by preferring appeal under Section 17 of the Act and all these petitions are preferred under Article 226 of the Constitution of India before this Court.

2. I have heard the learned Counsel appearing for the parties namely, Mr.Mihir H. Joshi, Mr.N.K.Majmudar, Mr.Bhagat, Mr.M.S.Shah, Mr.S.S.Shah, Mr.P.S.Champaneri, Mr.Marshal, Mr.J.T.Trivedi, Mr.A.M.Parekh, Mr.C.L.Soni, Mr.Kapadia, Mr.A.M.Raval, and Mr.Jayesh Dave, and other learned Advocates appearing on behalf of the petitioners who are mainly representing borrowers or loanees or the guarantors. I have also heard learned Counsel, Mr.M.J. Thakore, with Mr.Sangi, Mr.S.N.Soparkar, with Mr.Amar Bhatt, Mr.K.S.Nanavati with Mr.Chudgar, Mr.Panesar, Mr.P.V.Nanavati, and Mr.G.S.Thakkar, and other learned Advocates appearing for Financial Institution, Nationalized Banks, Other Banks and the Cooperative Banks, as the case may be.

3. The other learned Counsel appearing for the petitioners have adopted the submissions made by the aforesaid learned advocates Mr.M.H.Joshi and others appearing either for the borrowers or the guarantors, as the case may be, and the learned Counsel appearing for the Banks, may be Nationalized Banks or Cooperative Banks or other Banks, as the case may be, have adopted the submissions made by aforesaid learned advocates appearing for Banks namely Mr.M.J.Thakore and others.

4. The contentions raised by the learned Counsel appearing for the parties shall be considered and dealt with to the extent they are relevant for deciding the questions and the points involved in these petitions, in the subsequent portion of the judgement hereinafter.

5. It was already indicated to the learned Counsel appearing for the parties that the matters are being considered for final disposal and, therefore, the learned Counsel have accordingly made submissions for such purpose and, therefore, they are being decided finally.

6. When the hearing of the group had begun, it was already notified to all the learned Advocates appearing for the parties that the hearing of the present group of petitions which is under the Act has already started and those who want to address the Court may make submissions and if the learned Advocates are desirous to give notes for distinguishing facts, they may also give one page note for such purpose.

7. The perusal of the prayers made in the petitions and more particularly keeping in view notes submitted by the learned Advocates for giving distinguishing facts it appears that the present group of petitions can be

classified into various categories on facts as under;

(a) the petitions wherein challenge to the constitutionality of the provisions of the Act is attempted to be made by filing applications for amendment in the main Special Civil Applications;

(b) the petitions wherein the legality and validity of the notification dated 28-1-2003 issued by the Government of India for specifying "Cooperative Bank" as "Bank" for the purpose of the Act, is under challenge;

(c) the petitioners wherein the action of the Bank of issuing notice under Section 13(2) of the Act is challenged, but no reply to the said notice is given by the concerned petitioners;

(d) the petitions wherein the action of Bank of issuing notice under Section 13(2) is challenged and the reply is submitted by the concerned petitioners to the Bank, but Bank has not taken any action under Section 13(4) of the Act;

(e) the petitions wherein Bank has taken action under Section 13(4) of the Act and the matter is before the action of sale is taken or at a stage where proceedings for sale of the secured assets are going on;

(f) the petitions wherein Bank has resorted to the remedy under Section 13(2) of the Act, but the earlier proceedings initiated by the Bank are either pending before the DRT or before the Registrars' Board of Nominees or before the Gujarat State Coop. Tribunal or Appellate Forum or Higher Forum under any other law for the time being in force for the recovery of the money by the financial institutions or the bank against the borrowers;

(g) the petitions wherein there is a binding decision of either of DRT or of its Appellate Forum or of Registrars' Board of Nominee or of the Tribunal, as the case may be, on facts of adjudicating the outstanding amount and either the recovery certificate is issued or the award is passed which is in the process of execution;

(h) the petitions wherein the contentions raised are that the condition precedent of the default or of

classifying the debts as non-performing assets is not specified;

(i) the petitions wherein the contentions of the petitioners are that the secured assets in respect of whom the notice is issued is not mortgaged at all to the Bank;

(j) the petitions wherein pendency or reference before BIFR is sought to be contended as bar in proceedings under the present Act for enforcement of the security interests in the secured assets.

(k) The petitions are filed by guarantor of the loan challenging the action of banks either under Section 13(2) or 13(4) of the Act.

8. Learned Counsel, Mr.A.M.Raval and Mr.Kapadia and Mr.K.H.Baxi for the petitioners press for the challenge to the constitutional validity of the Act. In this regard it is pertinent to note that prior to the enactment of the Act, earlier "The Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest (Second) Ordinance, 2002" was in operation being Ordinance No.3 of 2002 (hereinafter referred to as "Ordinance") having the pari-materia provisions of the present Act. The constitutional validity of the said ordinance is already examined by the Division Bench of this Court (Coram: D.S.Sinha, C.J. (as he was then) and J.M.Panchal, J.) in the proceedings of SCA No.9769/2002 in the case of "M.R.Utensils v. Union of India" and the Division Bench of this Court has observed as under:

"4. Section 13 of the Ordinance provides that notwithstanding anything contained in Section 69 or Section 69A of the Transfer of Property Act, 1882 (4 of 1882), any security interest created in favour of any secured creditor may be enforced, without the intervention of Court or Tribunal, by such creditor in accordance with the provisions of the Ordinance. Sub-section (2) of Section 13 of the Ordinance contemplates that action by the secured creditor against the borrower may be initiated by a notice in writing calling him to discharge in full his liabilities within sixty days from the date of notice, failing which the secured creditor has been empowered to exercise all or any of the rights under sub-section (4) of Section 13 of the Ordinance.

5. Under sub-section (4) of Section 13 of the Ordinance, the secured creditor may take recourse to one or more of the following measures to recover his secured debt, namely :-

(a) take possession of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale for realising the secured asset;

(b) take over the management of the secured assets of the borrower including the right to transfer by way of lease, assignment or sale and realise the secured asset;

(c) appoint any person (hereafter referred to as the manager), to manage the secured assets the possession of which has been taken over by the secured creditor;

(d) require at any time by notice in writing, any person who has acquired any of the secured assets from the borrower and from whom any money is due or may become due to the borrower, to pay the secured creditor, so much of the money as is sufficient to pay the secured debt.

6. Sub-section (3) of Section 13 mandates to communicate to the borrower the details of the amount payable by him and the secured assets intended to be enforced by the secured creditor in the event of non-payment of secured debts by the borrower.

7. Section 17 of the Ordinance confers upon the borrower, aggrieved by any of the measures referred to in sub-section (4) of Section 13 by the secured creditor or his authorised officer, right of appeal to the Debts Recovery Tribunal having jurisdiction in the matter, within forty-five days from the date on which such measures had been taken. However, the right of appeal has been circumscribed by the provisions of sub-section (2) of Section 17 of the Ordinance, which provides that the appeal shall not be entertained by the Debts Recovery Tribunal unless the borrower has deposited with the Debts

Recovery Tribunal seventy-five per cent of the amount claimed in the notice referred to in sub-section (2) of Section 13. But, the embargo of deposit by the borrower with the Tribunal seventy-five per cent of the amount claimed in the notice is not absolute. Proviso to sub-section (2) of Section 17 empowers the Tribunal to waive or reduce the amount to be deposited by the borrower for the reasons to be recorded in writing.

8. Section 18 of the Ordinance confers upon the person aggrieved by any order made by the Debts Recovery Tribunal under Section 17 the right of further appeal to the Appellate Tribunal within thirty days from the date of receipt of the order of the Debts Recovery Tribunal.

9. Under Section 19 of the Ordinance the Debts Recovery Tribunal or the Appellate Tribunal, as the case may be, on an appeal filed under Section 17 or Section 18, is empowered to direct the secured creditor to return the secured assets to the concerned borrower, if it finds that the possession of the secured assets by the secured creditor was wrongful. This section further provides that the borrower shall be entitled to payment of such compensation and costs as may be determined by such Tribunal or the Appellate Tribunal.

10. The submission of the learned counsel, tested on the touchstone of the provisions of the Ordinance, does not hold water. The provisions regarding notice to the borrower, two appeals, restitution and compensation, contained in Sections 13, 17, 18 & 19 of the Ordinance, sufficiently and adequately take care of the interest of the borrower against the action taken against him by the secured creditor under Section 13 of the Ordinance. In the opinion of the Court, the impugned Ordinance does not suffer from the vice of arbitrariness. It is not in dissonance with the provisions of Article 14 of the Constitution in any manner."

9. In view of the above, since constitutional validity of the Ordinance is already upheld and the present Act is nothing but a substitute of the Ordinance by Act, the challenge to the constitutionality of the Act cannot be entertained since the constitutionality of the

pari-materia provisions of the very Ordinance which is substituted by the Act is already upheld by the Division Bench of this Court. In any case, the view taken by the Division Bench upholding the constitutional validity of the Act is binding to this Court.

10. Mr.Kapadia appearing for the petitioners could not show any of the distinguishing provisions of the Act vis-a-vis the provisions of the Ordinance. However, he only submitted that in view of the observations made by the Division Bench in the aforesaid judgement at para 11 that the exercise of examining the validity or even otherwise was academic and, therefore, it cannot be concluded that the Division Bench in the case of "M.R.Utensils"(supra) upheld the constitutional validity of Section 13 of the Act which is challenged by him. In my view, the observations made from para 4 to 10 which have been reproduced earlier shows that the Division Bench did examine the challenge to the pari-materia provisions of the Ordinance and, therefore, the binding effect of the view of the Division Bench of this Court upon this Court cannot be diluted and, therefore, the said contention of Mr.Kapadia fails and hence rejected.

11. Even otherwise also amendment sought to be inserted in the memo of petitions by the learned Counsel appearing for the petitioners challenging the vires of certain provisions of the Act lacks bonafide in as much as the petitioners who are represented by the learned Counsel, Mr.A.M.Raval, Mr.Kapadia and Mr.K.H.Baxi have pressed the amendment only at the time when SCA No.2786/2003 was already heard on 25-6-2003 and was placed for dictation of orders. Not only that, but initially all the petitions which are preferred by the petitioners represented by Mr.A.M.Raval, Mr.Kapadia and Mr.Baxi, without making any prayer for challenging the constitutional validity of the Act. Not only that, but the initial orders including interim orders were pressed before the Bench of the learned Single Judge and the matter is accordingly entertained and appropriate orders are also passed. It is only at the time when the matters are being heard finally by the Court, challenge to the constitutional validity of certain provisions of the Act is pressed on behalf of the respective petitioners. If any litigant is approaching a forum and not only that, but is also surrendering to the jurisdiction of that forum by pressing for the order in the proceedings initiated by such litigant and on the basis of such representation appropriate orders are also passed and the benefit to that extent is enjoyed by such litigant, thereafter at the time when the matter is taken up for

final disposal by the Court or is being heard with the other group of the same challenge and at that stage to press for challenge to the constitutional validity of certain provisions of the Act and thereby creating a situation, so that the matter may be required to be segregated and transferred to the other forum and thereby to continue to enjoy the benefits of the initial order until the another Forum finally decides the matter can be said as a dilatory practice and tactics of continuing with the proceedings which cannot be entertained or encouraged by the Court. If such practice or tactics are entertained, it would result into allowing the litigant to take undue benefits of delay in the proceedings and enjoyment of the initial or interim orders passed by adopting dilatory practice and tactics and such cannot be said to be bonafide action on the part of any litigant in the Court of law. Therefore, since such challenge to the vires of certain provisions of the Act by the petitioners, who are represented by Mr.A.M.Raval, Mr.Kapadia and Mr.Baxi lacks bonafide. Such amendment in the petition by bringing challenge to the vires of the provisions of the Act which is otherwise also concluded by the decision of the Division Bench of this Court and, therefore, also should not be allowed and deserves to be rejected.

12. The aforesaid takes me to examine the contentions raised by the learned Counsel appearing for the parties on the premise that the Act is intra vires to the powers under the Constitution of India. Before I consider the challenge and the contentions raised, some background beyond the Ordinance and the Act is required to be taken note of and such would enable the Court to interpret and examine various challenges made keeping in view the intention of the Parliament for legislating the Act. In the case of "K.P.Varghese vs. Incometax Officer, Ernakulum and Another" reported in AIR 1981 SC, 1922, the Apex Court, while considering the principles for interpretation of the Statutes, has observed that the proceeding of the legislature are relevant as it throws considerable light on the object and purpose of enactment of Statute.

13. While presenting the bill of the present Act in the Parliament the detail given, inter alia, shows that a new bill on Banking Sector Reforms was proposed to be introduced in the Parliament in strengthening creditors' right through foreclosure and enforcement of securities by Banks and Financial Institutions. The same was also on the basis of Narasimham Committee and Andhyarujina Committee reports which, inter alia, provided that legal

framework should be kept pace with changing commercial practice and with the Financial Sector Reforms. The said reports and recommendations also provide that the Bank should have power of taking of possession and sale of securities without the intervention of Court of the mortgaged properties. Therefore, if the background is seen, it shows that as on September 30, 2001 the Debt Recovery Tribunals had disposed of 18703 cases involving Rs.14026 crore, but the recovery made was Rs.3,527 crore. In this regard, it is worthwhile to consider that in Narasimham Committee's second report it was recommended that Globel Financial integration would call for a greater measure of competitive efficiency in our financial system. A strong and efficient financial system is necessary both to strengthen the domestic economy and make it more efficient and also to enable it to meet the challenges posed by financial globalization. On the question of legal framework, it was suggested that legal framework should be kept pace with changing commercial practice. The Committee has recommended as under:

"Under the head of legal framework it should be kept that in our system, the evolution of the legal frame has not kept pace with changing commercial practice and with the financial sector reform. As a result, the economy has not been able to reap the full benefits of the reforms process."

The Committee quoted some portion from the Report of Real Property Security Law of the Banking Laws Committee (Chairman Dr. P.V.Rajamannar) wherein the report has stated that -

"the situation that prevailed at the time of the enactment of the transfer of Property Act, 1882 justified the legislative action of the then Government of India in limiting the right of sale without the intervention of the Court only to such class of mortgages. But this situation became totally out of context with subsequent developments. Our Economic conditions have vastly changed since the enactment of the Transfer of Property Act, 1882. The role of unscrupulous moneylenders dominating in the field of credit is no longer valid. It is not the village moneylenders who is primarily required to extend credit in the mofussil. With our reliance on the industrialization of credit, banks and our financing institutions are the major lenders of

credit today. In their dealings with their mortgagors, it is anachronistic to assume that they will adopt the unscrupulous methods which are characteristic of unscrupulous moneylenders. In fact in extending credit, the necessity for suitable safeguards to banks and other financial institutions is now rightly stressed. It is understandable that the legal framework essentially conceived to deal with credit given by banks and other financial institutions, whose motivation is essentially not profit but socio-economic development."

On the question of vesting of the power of sale in DFI's/Banks the Committee observed that the power of sale in certain institutions like Land Development Banks and State Finance Corporations, has been vested through special statute. The Committee suggested that this approach should be extended to other Development Financial Institutions and if possible to banks through the Banking Regulation Act.

14. The background and the speech of the Hon'ble Finance Minister in the Parliament which has been referred to in the book of Law Relating to Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest by Taxmann's V.S.Datey shows that the same is enacted with a view to speed up the recoveries of the Banks and financial Institutions' outstanding by realisation of the security interest without intervention of the Court and is to provide legal framework for securitisation of the assets. The relevant portion of the statement of the objects when the bill came to be introduced read as under:

"The Financial Sector has been one of the key drivers of India's efforts to achieve success in rapidly developing its economy. While the banking Industry in India is progressively complying with the international prudential norms and accounting practices, there are certain areas in which the banking and financial Sector do not have a level playing field as compared to other participants in the financial markets in the world. There is no legal provision for facilitating securitisation of financial assets of banks and financial institutions. Further, unlike international banks, the banks and financial institutions in India do not have power to take possession of securities and sell them. Our existing legal framework relating to

> commercial transactions has not kept pace with the changing commercial practices and financial sector reforms. This has resulted in slow pace of recovery of defaulting loans and mounting levels of non-performing assets of banks and financial institutions. Narasimham Committee I and II and Andhyarujina Committee constituted by the Central Government for the purpose of examining banking sector reforms have considered the need for changes in the legal system in respect of these areas."

The aforesaid clearly goes to show that with a view to enable the Banks and Financial Institutions for recovery of the loans and for reducing the level of non-performing assets the Act has been enacted.

15. On behalf of the petitioners challenging the action of the Cooperative Banks, it was contended that the notification dated 28-1-2003 issued by Ministry of Finance, Government of India in exercise of power under Item V of Clause - C of sub-section 1 of Section 2 of the Act of specifying Cooperative Bank as the Bank under the Act is ultra vires the powers of the Constitution in as much as, so far as the Cooperative Banks are concerned it would fall under Entry 32 of the State List and the same would not fall either under Entry 43 or under Entry 45 of the Central List.

16. On the other hand, the learned Counsel appearing for the Cooperative Banks submitted, inter alia, that the Cooperative Banks are even otherwise covered under the Banking Regulations Act and, therefore, Cooperative Banks, even in absence of such notification, can invoke the provisions of the Act since they are covered as the Banks under the provisions of Banking Regulations Act. It was also submitted on behalf of the Cooperative Banks that the matter pertaining to transaction of banking includes the recovery of loans and, therefore, when the procedure is provided for recovery of loans or recovery of the bank dues, it is not a matter under Entry 32, but it is a matter under Entry 45.

The scrutiny of the aforesaid contention shows that the Act is enacted with the object, inter alia, for enforcement of the security interest of the Bank or Financial Institution. In the case of "Delhi Cloth and General Mills Co. Ltd. v. Union of India and Others", reported in AIR 1983 SC, 937, the Apex Court has observed as under:

" When a law is impugned on the ground that it is ultra vires the powers of the legislature which enacted it, what has to be ascertained is the true character of the legislation. To do that one must have regard to the enactment as a whole, to its objects and to the scope and effect of its provisions. To resolve the controversy if it becomes necessary to ascertain to which entry in the three lists, the legislation is referable, the Court has evolved the doctrine of pith and substance. If in pith and substance, the legislation falls within one entry or the other but some portion of the subject-matter of the legislation incidentally trenches upon and might enter a field under another list, then it must held to be valid in its entirety, even though it might incidentally trench on matters which are beyond its competence."

17. The statement of the objects of the Act as referred to hereinabove further shows that the Act is enacted with a view to enable the Banks and Financial Institutions to realise long-term assets, manage problems of liquidity, asset liability mismatches and recovery by exercising powers to take possession of securities, sell them and reduce non-performing assets by adopting measures for recovery or reconstruction. In this regard, if the provisions of the Banking Regulations Act (hereinafter referred to as "BRA") are examined, by virtue of Section 56 of the Act, certain provisions of the BRA are made applicable to Cooperative Societies dealing in banking business. Section 18 of BRA which is made applicable for Cooperative Banks provides for maintenance of cash reserves, Section 20 applicable for Cooperative Bank provides for restrictions on loans and advances by Cooperative Bank, Section 24 provides for maintenance of cash balance and other securities, Section 35 provides for inspection by the Reserve Bank of India(RBI), Section 35A provides for binding effect of the directives of RBI. Therefore, Section 56 of BRA, providing that with certain modifications, the provisions of BRA is applicable to the Cooperative Banks, in my view, goes to show that in substance the provisions of Part-II of the BRA relating to business of the Banking Companies are made applicable with modifications to all Cooperative Banks. It can hardly be legitimately disputed that method provided for recovery of loan by realisation of secured assets and thereby to provide mode for reduction of non-performing assets by the Cooperative Bank would not be a matter pertaining to Banking business, merely because a bank is a Cooperative Bank.

The law pertaining to regulating banking business would, by natural construction, include the method and manner of recovery of loans and realisation of assets and also the non-performing assets and hence it would not be sufficient to construe that Parliament has no power to legislate upon the method and manner of Regularisation and Enforcement of Security Interest which also includes recovery by the Cooperative Banks and it would fall under Entry 32 of State list. As such if a matter pertains to incorporation, regulations and winding up of Cooperative Societies, it would fall under Entry 32 of the State List, but the law providing the remedy of realisation of secured assets by the Cooperative Bank can be said to be a subject touching to banking. It is well settled that the entry should be given the widest possible interpretation and in my view, the banking would include various activities of the bank namely receiving monies from the depositors, providing for loan, maintaining of the cash reserves, assets, recovery of loans, realisation of secured assets, reduction of non-performing assets by realisation of monies etc., are various subjects, which can be said as touching to Banking provided under Entry 45 of Central list.

An attempt was made to submit that if the law pertaining for recovery of the Cooperative Bank dues are treated as under Entry 45, then in that case, the validity of the provisions of Section 96 of the Gujarat Cooperative Societies Act can be questioned. I am not required to examine the said aspect as the same is not issue before this Court to test the validity of Section 96 of the Gujarat Cooperative Societies Act, but the pertinent aspect is that as per the provisions of Section 37 of the Act, the provisions of the Act and the Rules made thereunder are in addition and not in derogation of any other law for time being in force and, therefore, even otherwise also as such there is no conflict. Moreover, Section 96 of the Act provides for resolving disputes between society and its members and such societies may not be Co-op Banks also.

18. Much reliance was placed on behalf of the petitioners upon the judgement of the Division Bench of this Court in the case of "Kheralu Nagarik Sahakari Bank Limited vs. State of Gujarat", reported in 1998 (2) GLR, 1517 to contend that such item squarely falls under Entry 32 of the State List and would not fall under Entry 45 of the Central List. In the case "Kheralu Nagarik Sahakari Bank Limited"(supra), the Division Bench of this Court was considering whether the State legislature can provide for making provisions for seeking permission of the

Government for making certain investment by a Cooperative Bank. The Court interpreted Entry 43 of List - I and observed that Cooperative Societies are excluded from Entry 43 of Central list and, therefore, it would fall under Entry 32 of State list. In my view, the decision in the case of "Kheralu Nagarik Sahakari Bank"(supra) cannot be read as holding that the matter pertaining to banking business of a Cooperative Bank would not fall under Entry 45 of Central list and, therefore, the said judgement is of no help to the petitioners. In exercise of the power under Section 2(1)(c)(v) of the Act, the Central Government has included by the impugned notification, the Cooperative Banks in the definition of Bank and the same, in my view, is within the scope and ambit of the legislative competence of Parliament and cannot be said to be ultra vires the powers under the Constitution of India. The notification is subordinate legislation and the purpose of the enactment of the main Act itself is for providing procedure for regulation and realisation of security interest in secured assets by the banks and when the Central Government in its legislative wisdom has found it proper to include Cooperative Banks also within the definition of the word "Bank" for attaining the object in the field of Cooperative Banks, it cannot be said that such piece is of subordinate legislation as per the impugned notification is beyond the scope and ambit of the Act itself and, therefore, challenge to the legality and validity of the notification dated 28-1-2003 on the ground that it is ultra vires to powers of Parliament or Central Government, fails and hence rejected.

19. Reliance was also placed on behalf of the petitioners upon the judgement of the Apex Court in the case of "R.C.Tiwari vs. M.P.State Coop. Marketing Federation Ltd. & Ors.", reported in 1997 (5) SCC, 125 to contend that when special provision is made normal remedy gets excluded. It was submitted that since the provisions for recovery is already made under the Gujarat Cooperative Societies Act, the remedy under any other law is excluded. Such contentions, while considering the provisions of the Act, deserves to be rejected on the face of it, because as observed earlier, the provisions of the Act are in addition to any other law for time being in force and by the present Act as additional mode of recovery and realisation of securities have been provided and, therefore, when there is express provision under the Act, such general principles and the decision providing for such general principles cannot be made applicable. It was also sought to be contended on behalf of the petitioners that so far as Cooperative Banks are

concerned, the rights and liabilities of the member of a bank are governed by the provisions of the bye-laws and such bye-laws, inter alia, provides for filing of the suits before the Nominee, which cannot be nullified by the provisions of the present Act enabling the Cooperative Banks to resort to the provisions of the Act. In my view, such contention also deserves to be rejected because no bye-law can operate on the face of statutory provisions and it is otherwise within the power of legislature to enact a law even though the existing bye-laws provides for such governing of a relationship. Even if the bye-laws are treated as an agreement between the member and a Cooperative Bank, which is a Cooperative Society, then also as per the provisions of Section 35 of the Act, the provisions of the present Act shall have the effect notwithstanding other law for the time being in force and/or an instrument having effect by virtue of such law. Moreover, the method providing for remedial measure is for realisation of security interest in secured assets of a Cooperative Bank and such method/procedure is in addition to the provisions of any other law for the time being in force, therefore, it cannot legitimately be contended that the Cooperative Banks cannot resort to the provisions of the Act for realisation of their secured assets as per the present Act.

20. The learned Counsel for the petitioners have contended, inter alia, that the operation of the Act is prospective in nature and is not retrospective. In furtherance to the said submission, it has been contended that unless the apparent intention of the legislature is to make any statute retrospective, a normal presumption would be to treat it as prospective. It was submitted that the language used under Section 13(2) "makes any defaults" and the language "such debt is classified" are sufficient to show the intention of the Parliament to make the provisions of the Act as prospective. It was also submitted on behalf of the petitioners that certain provisions of the Act, more particularly Chapter IV is not even brought into force requiring for maintenance of registration of securities etc., and, therefore, it was submitted that such circumstances also throw light upon the intention of the Parliament to make the Act prospective and not retrospective and, therefore, it was submitted that it is only in case where the default is after the Act coming into force and the debt which has accrued after the Act has come into force and the loan transaction which has taken place after the Act came into force, would be covered by the provisions of the Act and not the default or the loan transaction or the debt prior

to the Act, as the case may be.

21. Whereas, on behalf of the Banks, the learned Counsel had submitted, inter alia, that the intention is apparent to make the provisions retroactive and also to apply the provisions of the Act retrospectively.

22. Therefore, it will have to be examined as to whether the Act as such is retrospective or retroactive or only prospective.

23. It is well settled that normally any statute or law would be presumed to be prospective unless the intention of legislature or the Parliament is apparent to make it retrospective. However, such presumption is not available in a matter where statute or the Act is pertaining to the procedural law or a remedial measure. Therefore, in my view, the first aspect deserves to be examined is whether the Act is a procedural law or is enacted providing alteration substantive rights of the parties. The transaction of mortgage prior to the Act came into force were fully governed by the provisions of the Transfer of Property Act, 1882 (hereinafter referred to as "TP Act"). Section 67 of the TP Act provides for rights to foreclosure or sale under the head of rights and liabilities of mortgagee. The said provisions of TP Act provides that the mortgagee has a right to obtain a decree at any time after the mortgage money has become due in case redemption of the mortgage property is not made or if the mortgage money has not been paid or deposited. Such rights of the mortgagee for foreclosure or sale as per the provisions of Section 67 read with Sections 67A and 68 are various rights provided for realisation of mortgage money. However, Sections 69 and 69A of TP Act provide for restriction over the power of mortgagee to sell the mortgaged property without intervention of the Court unless the mortgage is falling under the exceptional Clause as provided under Clause A to C of Section 69(1) of TP Act. Section 69(2) of the Act provides for such power not to be exercised until notice is given in writing requiring payment of principle money and unless the default has been made in payment of the principle money or part thereof for three months after the service of such notice or unless the interest under the mortgage is at least Rs.500/= and has remained unpaid for three months after it becomes due. The other provisions of Sub-section 3 and Sub-section 4 of Section 69 of the TP Act are regulating the manner and method of sale of the mortgaged property. Section 69A of the TP Act provides for appointment of the receiver for receiving income of the mortgaged property or any part

thereof. Therefore, it appears that the provisions of Sections 67, 68, 69, and 69A are the provisions made under the TP Act providing for the procedures to be followed by the mortgagee for realisation of money from a mortgagor and upon failure by the mortgagor to make the payment after such notice the entitlement of the decree in respect to mortgaged property and the consequential sale etc.

If the provisions of the present Act are examined, Chapter III itself provides for enforcement of the security interest. Section 13(1) of the Act provides for the rights of any secured creditor to enforce security without intervention of the Court or Tribunal notwithstanding anything contained in Section 69 or 69A of TP Act. The perusal of various provisions made under Chapter III namely, Section 13 providing for enforcement of security interest, Section 14 providing for Chief Metropolitan Magistrate or District Magistrate to assist secured creditor in taking possession of secured asset, Section 15 providing the manner and effect of taking over the management, Section 16 providing for no compensation to the Director for loss of office, Section 17 providing for right to appeal to the Debt Recovery Tribunal, Section 18 providing for a further right to prefer appeal to Appellate Tribunal against the order of the DRT under Section 17, and Section 19 providing right of the borrower to receive compensation and costs upon DRT or the Appellate Tribunal holding that possession is wrongfully taken by the Creditor, are essentially the provisions pertaining to the procedural aspects providing for realisation of security interest by the creditor from the borrower. As per the provisions of Section 36 of the Act, no secured creditor shall be entitled to take measures unless the claim in respect of financial assets is within the period of limitation as provided under the Limitations Act, 1963 is also one of the relevant circumstances to show that the provisions of the Act, more particularly Chapter III is pertaining to the procedural aspects or a remedial measure provided by the Act for enforcement of security interest in secured assets by the secured creditors. Section 37 of the Act, as observed earlier, provides that the provisions of the Act is in addition to and not in derogation to any other law for time being in force and, therefore, by the present act, the additional remedial measures and procedure is provided for certain class of secured creditors namely, the Banks and Financial Institutions, who are covered under the Act for enforcement of the security interest. Therefore, it can be said that the present Act is providing for an additional procedure for

enforcement of security interest in secured assets by a certain class of secured creditors.

24. At this stage it would not be out of place to take note that power of taking possession of the suit property and effecting sale of the suit property pending the suit are not unknown to the procedure for conducting of a suit or trial as provided under the Code of Civil Procedure. Even at present also as per Order 40 of Code of Civil Procedure, if the Court finds just and proper, it may appoint Receiver for taking possession or custody of the property, before or after the decree, or remove any person from the possession or custody or may commit any person for management as the receiver or may confer upon the receiver of such powers as it may deem fit as per the provisions of Order 40 Rule 1. Therefore, the measures are provided even under the CPC which itself is a procedural law for regulating the procedure of all the civil suits including suits by mortgagee against mortgagor for recovery of mortgage money, interest, etc. The only distinguishing features are that the procedures are provided through the Court, whereas by the present Act, the procedures can be directly effected by the secured creditors for realisation of enforcement of security interest in the secured assets and the action or the measures taken by the secured creditors is made subject to the right of the aggrieved party to prefer appeal before the DRT and the second appeal before the Appellate Tribunal. Therefore, such type of the law providing such procedure is not unknown or something new. The law would continue to remain as procedural law, whether the remedy is provided of enforcement of security interest in secured assets, either through the Court or directly by secured creditor and the intervention of the Tribunal or Appellate Tribunal thereafter.

25. The another aspect which is required to be taken note of is that it is not even the contention of the petitioners that even though there is no default in payment of mortgage money, power is given to mortgagee to enforce security interest. Had the Act provided for giving right to secured creditors to enforce security interest, even though there is no default in payment of mortgage money the matter would have been different. But in the present case it is only when borrower makes default in making payment of mortgage money or loan, as the case may be, in repayment of secured debts or any instalment thereof, the secured creditor would be entitled to exercise rights under Sub-section 4 of Section 13. Therefore, the default in payment of mortgage money and right of mortgagee to recover mortgage

money which is the requirement for resorting to procedure to recover the amount subsequently remains the same either under TP Act or under the present Act. Not only that but the additional aspect is that such debt should have been classified by secured creditor as non-performing assets. The words "non-performing assets" is defined as per the Section 2(o) of the Act as "Assets or account of a borrower, which has been classified by a bank or financial institution as substandard, doubtful or loss asset, in accordance with the directions or under guidelines relating to assets classifications issued by the Reserve Bank." It was submitted that as per present prevailing guidelines issued by the RBI if the account of the borrower is in default for two quarterly period, then only such mortgage or assets or security interest can be classified as non-performing assets. Whether a particular account of the borrower or the secured assets is classifiable under non-performing assets or not is essentially as per the RBI guidelines. It is only in respect of two contingencies proving namely of default in repayment and as per the present guidelines of RBI, such default is for last six months (two quarterly period), the secured creditor may enforce security interest as per the procedure provided under Section 13. Prior to the present Act the secured creditors were required to file the proceedings before the competent Court or the Tribunal, as the case may be, for enforcement of the security interest unless they are secured creditors falling under Clause (a) to (c) of Section 69. Now by the present Act an additional procedure is provided for secured creditor for enforcement by realisation of security interest.

No defaulter who has become liable to make the payment as per terms of agreement of loan can assert as of right, that since the procedure or recovery of the defaulted money is provided additionally or changed by the legislature or the Parliament, it results into altering a vested right of mortgagor who has acquired status of a defaulter by not paying the mortgage money or loan amount as agreed. As such no defaulter can invoke principles of equity by contending that recovery through intervention of Court was to result into delay in process of recovery and since the same will not be there on account of direct power/right given to creditor, injustice will be caused to him if provisions of the Act are interpreted as retrospective or retroactive. No person can be allowed to contend that since the procedure is changed of facing the consequences of default, may be through the intervention of the Court initially or afterwards such procedural laws should be read as

prospective only and it would not apply to the defaults which has already become due when the Act came into force. It is well settled that all procedural laws providing for remedial measures, either of realisation of money or for imposition of penalty are retrospective to the extent of covering the conditions for applying the remedy already accrued earlier or retroactive. In the case of "Dena Bank vs. Bikhabhai Prabhudas Parekh & Co. and others", reported in AIR 2000 SC, 3654, the Apex Court, while considering the contention raised on behalf of the appellant and while construing the provisions of Karnataka Sales Tax Act, at para 16 observed as under:

"A legislation may be made to commence from a back date, i.e. from a date previous to the date of its enactment. To make a law governing a past period on a subject is retrospectivity. A legislature is competent to enact such a law. The ordinary rule is that a legislative enactment comes into operation only on its enactment. Retrospectivity is not to be inferred unless expressed or necessarily implied in the legislation, specially those dealing with substantive rights and obligations. It is a misnomer to say that sub-section (2-A) of Section 15 of the Karnataka Sales Tax Act is being given retrospective operation. Determining the obligation of the partners to pay the tax assessed against the firm by making them personally liable is not the same thing as giving the amendment a retrospective operation. In Principles of Statutory Interpretation (by Justice G.P. Singh, Seventh Edition, 1999, at page 369), it is stated:-

The rule against retrospective construction is not applicable to a statute merely "because a part of the requisites for its action is drawn from a time antecedent to its passing". If that were not so, every statute will be presumed to apply only to persons born and things come into existence after its operation and the rule may well result in virtual nullification of most of the statutes. An amending Act is, therefor, not retrospective merely because it applies also to those to whom pre-amended Act was applicable if the amended Act has operation from the date of its amendment and not from an anterior date."

26. In the case of "Dilip vs. Mohd. Azizul Haq and

Anr." reported in AIR 2000 SC, 1976, the Apex Court, while considering the effect of Clause 13-A which came to be introduced while appeal was pending against the decree passed in civil suit and while considering the question as to whether the tenant is entitled to protection under Clause 13-A or not observed at para 8 as under:-

> "The provisions came into force when the appeal was pending. Therefore, though the provision is prospective in force, has "retrospective effect". This provision merely provides for a limitation to be imposed for the future which in no way affects anything done by a party in the past and statutes providing for new remedies for enforcement of an existing right will apply to future as well as past causes of action. The reason being that the said statutes do, not the affect existing rights and in the present case, the insistence is upon obtaining of permission of the Controller to enforce a decree for eviction and it is, therefore, not retrospective in effect at all, since it has only retroactive force."

The Apex Court further observed at para 9 as under:

> " The problem concerning retrospectivity concerning enactments depends on events occurring over a period. If the enactment comes into force during a period it only operates on those events occurring then. We must bear in mind that the presumption against retrospective legislation does not necessarily to apply an enactment merely because a part of the requisites or its action is drawn from time antecedent to its passing. The fact that as from a future date tax is charged on a source of income which has been arranged or provided for before the date of the imposition of the tax does not mean that a tax is retrospectively imposed as held in Commissioners of Customs and Excise v. Thorn Electrical Industries Ltd., (1975) 1 WLR 1661. Therefore, the view of the High Court that clause 13-A is retrospective in effect is again incorrect."

27. Therefore, it can be said that merely because a statute looks at the past and provides for the remedy in future after the enforcement of the Act, in reality cannot be said to be retrospective, but can be said to be retroactive and such character of retroactivity is in

respect of all procedural laws as and when it is enacted. Further, as observed earlier, the Act is a procedural law providing for the remedial measures for realisation of secured debts by enforcement of the security interest of the secured creditors.

28. In the case of "Memon Abdul Karim Haji Tayab, Central Cutlery Stores, Veraval v. Deputy Custodian-General, New Delhi & Ors.", reported in AIR 1964 SC, 1256, the Apex Court had an occasion to consider as to whether provisions of Section 48 of the Recoveries of Administration of Evacuee Property Act, 1950 for recovery of certain sums as the land revenue which came to be inserted by the amendment is to be applied to the pending action or not and while examining the contentions that whether amended Section 48 can be applied to the present case or not, the Apex Court at para 4 observed as under:

> " It is well settled that procedural amendments to a law apply, in the absence of anything to the contrary, retrospectively in the sense that they apply to all actions after the date they came into force even though the actions may have begun earlier or the claim on which the action may be based may be of an anterior date."

29. Therefore, in light of the above, if the statement of the objects and reasons clause are considered the same is with a view to facilitate the securitisation of financial assets of banks and financial institutions with or without benefits underlying the securities. Even the history and the background as referred to in the earlier paragraph goes to show that since the existing legal framework relating to commercial transactions has not kept pace with the changing commercial practice and with the Financial Sector Reforms, the Act has been enacted. It also shows that the mode of recovery through DRT was very low in comparison to the claims involved of the nationalized Banks and hence the Act has been enacted. Even otherwise also if the provisions of the Act itself are examined, Section 2(f) defines that the word "borrower" means any persons who has been granted financial assistance by any Bank or who has given any guarantee. The language used in the definition clause of borrower under Section 2(f) shows the intention of the statute to include all borrowers who have been granted financial assistance before the Act came into force. Section 2(j) defines the word "default" and the language used is "account of such borrower is classified as non-performing assets." Section

2(k) provides for definition of financial assets also uses the language "any loan or any advance granted or debenture, bond subscribed or guarantee given", Section 2(n) provides for definition of hypothecation, where the language used is "credit by a borrower", Section 2(z)(c) providing for defining secured assets provides for the language "the property on which security interest is credited", Section 2(z)(f) defines security interest and the language used is "credit in favour of any secured creditor". The language used under Section 13(1) is "under security interest credited in favour of secured creditor may be enforced." The language used under Section 13(9) is "in case of a company in liquidation" Even in the second proviso of the said sub-section, the language is "in the case of a company being wound up on or after the commencement of this Act". In the schedule providing for the abatement of the reference the language used is "whether a reference is pending before the Board for Industrial and Financial Restrictions" and further words used are "financial assistance disbursed to borrower". In my view, aforesaid languages used by legislature in the Act are more than sufficient to show the intention of the legislature to include the transactions of loan already entered into on the date when the act came into force and, therefore, merely because in sub-section 2 of Section 13 there is a use of words "makes any default", it cannot be read that the Act would not apply to the loan transaction and security interest created prior to the Act came into force. If such an interpretation is given it would frustrate the very intention of the legislature and not only that, but it would also result into nullifying the effect and operation of number of provisions of the Act.

30. Even otherwise also, as observed earlier, since the Act is a procedural remedial measure provided to a certain class of secured creditors for enforcement of security interest, it cannot be read as having effect only qua the actions and the transactions of loan after the Act came into force or a default or non-performing assets after the Act came into force. As such the Act intends to cover up all transactions of loan already entered into subject to the provisions of within the period of limitation and the defaults in making repayment and the debts already classified as non-performing assets and such future contingencies too, therefore, the said contentions raised on behalf of the petitioners fail and hence rejected.

31. It was contended on behalf of the petitioners that the bank or the financial institutions covered by

the provisions of the Act cannot resort to two parallel remedies even if it is considered that in view of the provisions of the present Act the transactions of loan already entered into prior to the Act would also be covered in the present Act. The learned Counsel for the petitioners had pressed in service the doctrine of election for substantiating such contention. It was also submitted on behalf of the petitioners that in view of Section 13(10) providing for filing of the application before the DRT for the balance amount of the dues of the secured creditors shows that the Parliament intended for only one remedy at a time and after the one remedy is exhausted, the second remedy can be resorted to.

32. On behalf of the respondent banks, it was submitted, inter alia, that as such the principles of doctrine of election would not be applicable in the present case since there are not inconsistent remedies and the remedy provided under the present Act is a remedy limited to the enforcement of the security interest qua secured property, whereas remedy in normal law for recovery of outstanding is would be wider remedy, which can be enforced against the personal property of the judgement debtor in case if such contingencies arise. It was also submitted on behalf of the banks that if only one remedy is read at a time, the consequence would be that the limitation period qua the other remedy may expire and as a result thereof the bank will lose right to recover the borrowed amount for all time to come, which can never be the purpose of providing the remedy under the present Act.

33. Therefore, the first aspect in this regard required to be considered is the scope and ambit of the remedy provided under this Act vis-a-vis the normal remedy for recovery of the outstanding amount by the bank either under the recovery of debts due to the banks and financial institutions under the Act of 1993 or under the Gujarat Coop. Societies Act or under any other law providing for recovery of the outstanding dues as the creditor prevailing from time to time. As observed earlier, the present Act provides as one of the remedial measures, but is operating qua security interest created in the property and for enforcement of such security interest of certain class of secured creditors. The perusal of various provisions of the Act makes amply clear that subject to the exceptions provided under Section 31 of the Act, the secured creditor may enforce any security interest created in his favour without intervention of the Court or Tribunal in the manner as provided under the Chapter III of the Act and other

incidental provisions of the Act. Therefore, the remedy provided under the present Act is only covering secured assets and security interest created in the property and not beyond that, whereas the normal law providing for remedy either before the DRT or before the Board of Nominee under the Gujarat Cooperative Societies Act or before any other forum would be available to all creditors including secured creditors to recover the amount if ultimately the recovery certificate is issued or the award is passed or decree is passed in his favour against debtor or borrower, as the case may be. In such proceedings the execution of the recovery certificate or the award or the decree can also be against personal property of the concerned judgement debtor or opponents or defendants, as the case may be. Moreover, as per provisions of Section 31 of the Act, the provisions of this Act or the rules made thereunder are in addition to and not in derogation of the Companies Act, 1956, Securities and Exchange Board of India Act, 1992 or the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 or any other law for the time being in force. Hence when two modes of recovery of the realisation of the dues are provided out of which one is limited to secured assets or security interest in secured assets and the another is against all assets including personal assets of the Debtor, it cannot be said that such remedies are inconsistent to each another. The remedy provided under the present Act is restricted remedy to secured creditors that too a certain class of secured creditors, whereas the law for providing normal remedy for all class of creditors is a wider remedy. There is nothing as such inconsistent in both such remedies, save and except, when the question arises for resorting to both the remedies simultaneously qua the secured assets, which shall be dealt with hereinafter. As such the question of considering the doctrine of election would arise only when there are two inconsistent remedies provided.

34. In the case of "Nagubai Ammal and Others v. B Shama Rao and Others", reported in AIR 1956 SC, 593, while considering the contention for doctrine of election, the Apex Court observed at para 23, the relevant portion is as under:

" It is clear from the above observations that the maxim that a person cannot approbate and reprobate is only one of the application of the doctrine of election, and that its operation must be confined to reliefs claimed in respect of the same transaction and to the persons who are

parties thereto."

The Apex Court abstracted from "Halsbury's Laws of England, Vol.XIII, p. 454, para 512 as under:

"On the principle that a person may not approbate and reprobate, a species of estoppel has arisen which seems to be intermediate between estoppel by record and estoppel in pais, and may conveniently be referred to here. Thus a party cannot, after taking advantage under an order (e.g. payment of costs), be heard to say that it is invalid and ask to set it aside, or to set up to the prejudice of persons who have relied upon it a case inconsistent with that upon which it was founded; nor will he be allowed to go behind an order made in ignorance of the true facts to the prejudice of third parties who have acted on it."

35. In the case of "A.P. State Financial Corporation v. M/s.Gar Re-Rolling Mills and Another", reported in 1994(2) SCC, 647, the Apex Court, while considering the question of law as to whether the financial corporation set up under Section 3 of the State Financial Corporation Act is entitled to take recourse to remedy available to it under Section 29 of the Act, even after having obtained the order or decree after invoking the provisions of Section 31 of the Act, but without executing the decree/order or not, at para 15 observed that

"the Doctrine of Election clearly suggests that when two remedies are available for the same relief, the party to whom the said remedies are available has the option to elect either of them but that doctrine would not apply to cases where the ambit and scope of the two remedies is essentially different."

The Apex Court further, after observing "that the Parliament gave the Corporation the right to proceed under Section 31, preserving at the same time its right and remedy under Section 29, so that the Corporations are not choked by the defaulting debtors by adopting frustrating or dilatory tactics in the proceedings in the court initiated under Section 31 of he Act.", observed at para 19 as under:

" The right vested in the Corporation under Section 29 of the Act is besides the right

> already possessed at common law to institute a suit or the right available to it under Section 31 of the Act. Since, the Corporation can withdraw from the Court its proceedings under Section 31 of the Act at any stage, it would imply that it has the right to withdraw from further proceedings under Section 31 and 32 of the Act even after obtaining an order in its favour and take recourse to the proceedings under Section 29 of the Act without pursuing the proceedings under Section 31 of the Act any further. The Corporation cannot, indeed, execute the order under Section 31 of the Act and yet simultaneously take recourse to proceedings under Section 29 of the Act for the same relief. The position may also be different if the claim of the Corporation is negatived, on facts, by the Court in the proceedings under Section 31 of the Act. In that event depending upon the facts of each case, it may be permissible to hold that fair play and justice demand that the Corporation is not allowed to take recourse to the provisions of Section 29 of the Act."

36. Thus, from the above observations of Apex Court it appears that the answer to the question posed in the opening part of the judgement is found in affirmative by Apex Court. However, the learned Counsel appearing on behalf of the petitioners had placed much reliance upon the observations made by the Apex Court at para 17 to contend that as per the observations of the Apex Court either of the remedies should be withdrawn, then only the another remedy can be allowed to be pursued. In my view, as such, the question considered by the Apex Court in the said judgement is apparent at para 1 and the answer is in affirmative at para 19. Therefore, the correct reading and ratio of the judgement is that it has been held by the Apex Court that even after having obtained the order or decree after invoking provisions of Section 31 of the Act, but without executing the decree or order, the remedy is available to such financial corporation under Section 29 of the Act. In my view, the aforesaid judgement of the Apex Court cannot be read as laying down the principles that when two simultaneous remedies are provided under the Act for recovery of the outstanding dues, while resorting to one, the another must be abandoned or withdrawn. However, the aforesaid observations made at para 19 of the judgement which is rather a conclusion while answering the question by the Apex Court at the most it can be said that execution of the order under Section 31 of the Act and yet

simultaneously take recourse to proceedings under Section 29 of the Act for the same relief was not permissible. The Apex Court has also observed that the position may also be different if the claim of the Corporation is negatived, on facts, by the Court in the proceedings under Section 31 of the Act. The Apex Court also further observed by leaving it open depending upon the facts of each case, as it may be permissible to hold that fair play and justice demand that the Corporation should not be allowed to take recourse to the provisions of Section 29 of the Act, but ultimately concluded that after obtaining the order under Section 31 of the State Financial Corporations Act, proceedings under Section 29 of the Act can be resorted to.

37. In the case of Bhau Ram vs. Baij Nath Singh and Others", reported in AIR 1961 SC, 1327, while considering the rule of application of doctrine of election, the Apex Court has observed at para 12 as under:

" It seems to us that a statutory right of appeal cannot be presumed to have come to an end because the appellant has in the meantime abided by or taken advantage of something done by the opponent under the decree and there is no justification for extending the rule in Tinkler's case, (1894) 154 ER 1176 to cases like the present."

The Apex Court further observed as under:

" Further, it seems to us that the existence of a choice between two rights is also one of the conditions necessary for the applicability of the doctrine of approbate and reprobate. In the case before us there was no such choice before the appellant, and, therefore, his act in withdrawing the pre-emption price cannot preclude him from continuing his appeal."

38. In view of the above, it appears that the doctrine of election and the rule that a person cannot approbate and reprobate at the same time is based on the principles of equity. It is well settled that no principles of equity can march over any statutory provisions or requirement of law. However, at the same time, when two remedies are simultaneously provided under the Act, even if the Court interprets to the extent that both the remedies can simultaneously be resorted to, no situation can be allowed to be created against basic principles of fair play and justice. The Court, while

construing simultaneous remedial measures under two different statutes would normally not allow the situation to be created which results into either of creating conflicting situation or to allow or to enable the party to any of the proceedings to take undue benefits or undue advantage therefrom.

39. If the aforesaid is kept in mind and the provisions of the present Act are examined and compared with the provisions of the other law for the time being in force for mode of recovery of the outstanding dues by the bank, there is express provisions of Section 37 of the present Act providing for applicability of the present Act and rule in addition to any other law for the time being in force. Hence the contention raised on behalf of the petitioners that as per the principles of doctrine of election or the rule that a person cannot be allowed to approbate or reprobate at the same time and, therefore, the secured creditors or the financial institutions covered by the Act cannot simultaneously resort to the remedies provided under this Act with the remedies provided under any other law for the time being in force for recovery of the outstanding dues, cannot be accepted. There is one more additional reason in observing as above because for both such remedies namely; the remedies under any other law for the time being in force for recovery of the outstanding dues and the remedy provided under the present Act, the provisions of the Limitation Act, 1963 are applicable and if only one is allowed to be resorted to, in that case, on account of delay or otherwise, the other remedy may be barred which can never be said to have been intended by the legislature while enacting the present Act meant for changing the legal frameworks for recovery of the outstanding dues of the financial institutions and the banks by realisation of security interest in the assets. If the situation is created of allowing only one remedy at a time, it may create further irreversible situation which cannot be said to be intended by the Parliament. As observed earlier, the Act is retroactive in nature and it covers all transactions entered into prior to the Act came into force and, therefore, it is deemed and it can reasonably construed that the Parliament was aware that the proceedings are filed or pending before the Tribunal or before the other competent forum for recovery of the dues and it is with that purpose the provisions of Section 37 are made in the Act. But if one remedy at a time is permitted or the condition is read that for resorting to the present remedy under the Act, the other proceedings before the Tribunal or before any competent forum for recovery of the outstanding dues should be

withdrawn, then in that case, for all time to come, it may result into abandonment of the claim by the creditor which can never be said to have been intended by the Parliament while enacting the present Act and, therefore, also the contention raised on behalf of the petitioners deserves to be rejected and hence rejected.

40. However, in a given case it may happen that the bank or the financial institutions may resort to simultaneous remedies as provided under the Act, but in such circumstances no party to the proceedings, either under the Act or before the competent forum under any other law for time being in force for recovery of the outstanding dues, can be allowed to create a situation of nullifying the effect of a binding judgement on facts by resorting to the provisions of the present Act, nor can any party be allowed to create a situation which may results into conflicting the decision of competent forum provided under any other law for the time being in force or forum provided under the present Act. As such, under those circumstances it would be for the authority or the Tribunal or the Judicial Forum or any other Forum before whom the matter is pending to stay proceedings qua secured assets, if the creditor has resorted to the remedies under the present Act, if circumstance so demands. At the same time, if any money is realised by resorting to the remedies provided under this Act, it will have to be given credit of in the other proceedings under any other law for the time being in force. Alternatively the secured creditor while resorting to the provisions of the present Act qua secured assets cannot be allowed to proceed for nullifying the effect of any binding judgement or order on facts of a competent forum for recovery of dues under any other law for the time being in force. There can not be any exhaustive list for considering the facts and circumstances of various contingencies, but suffice to say that while maintaining the two simultaneous remedies, no parties to the proceedings should be allowed to take any undue benefits which results into frustrating the basic principles of justice and good conscience.

41. A contention was also raised on behalf of the petitioners that allowing the financial institutions to resort to the remedies for enforcement of security interests under the present Act is to result into adverse serious consequences of having effect of abatement of reference pending before BIFR and, therefore, it deserves to be reasonably construed including for reading the principles of natural justice of giving opportunity of hearing and of passing reasoned order by the financial

institutions. So far as the application to the principles of natural justice is concerned, the said contention shall be dealt with hereinafter at appropriate stage, but the perusal of the schedule and more particularly second proviso of Section 15 of the Sick Industrial Companies (Special Provisions) Act, 1985 which is sought to be amended by the present Act provides that the reference shall abate if the secured creditor representing not less than 3/4 in value of the amount of financial assets disbursed to the borrowers of such secured assets, has taken any measures to recover that secured debts under Sub-section 4 of Section 13 of the Act.

42. If the aforesaid provision is examined keeping in view the provisions of Section 13(9) of the Act, it is apparent that where there are more than one secured creditors no secured creditor is entitled to exercise any or all of the rights under Section 13(4) unless exercise of such right as agreed upon by the secured creditors representing not less than 3/4 in value of the amount outstanding as on a record date and such action shall be binding on all the secured creditors. Therefore, even if the notice is issued under Section 13(2) of the Act, it is obligatory on the part of the secured creditor who is desirous to take measure under Section 13(4) of the Act to get consent of the secured creditors representing not less than three-fourth in value of the amount outstanding. Therefore, when the legislature in its wisdom has found it proper to ensue the consequences of abatement of the reference even if in respect of a single financial asset, the measures are taken under Section 13(4) of the Act by one of the secured creditors that the consent of the three-fourth of the secured creditors representing the value of the amount outstanding, then in that case it cannot be said that the provisions must be read to the effect that such measures should have been in respect of all financial assets and not a financial asset. When the legislature has used the words "a financial asset" substituting the words "all financial assets" would result into re-writing the language of the statute or the substitution of the words which Court would not do while exercising the power under Article 226 of the Constitution of India. Hence the said contention raised on behalf of the petitioners fails.

43. The learned Counsel for the petitioners who are guarantors of the loan transaction also attempted to contend that if there is failure on the part of principal borrower then only the action can be taken by the secured creditor and, therefore, direct action against

guarantors' property having security interest of the secured creditor is bad in law. Prima facie, such contention appears to be attractive, but a close scrutiny of the same keeping in view the provisions of Section 13 and more particularly Sub-section (11) of Section 13 shows that legislature itself has by express provision provided that the secured creditor shall be entitled to proceed against guarantors or sell the pledged assets without first taking any of the measures under Section 13(4) of the Act in relation to secured assets and hence on the face of intention of legislature, such contention has got to be rejected.

44. The aforesaid takes me to examine the contention raised on behalf of the petitioners for reading the principles of natural justices while exercising the powers by the Banks under Sections 13(1) and (2) of the Act. It was contended on behalf of the petitioners that since the action of the Banks for enforcement of the security interest is to result into civil consequences and only requirement under the Security Interests (Enforcement) Rule, 2002 is to issue notice and no provision is either under the Act or under the Rule against the notice, therefore, it is required that the principles of natural justice must be read when the Banks decides to exercise the power. It was also submitted on behalf of the petitioners that the lender or the secured creditor is made Judge of his own cause and notice itself is not sufficient and the remedy of providing appeal under Section 17 of the Act is only after the possession is taken over under Section 13(4) of the Act and, therefore, such remedy cannot be said to be meaningful and, therefore, with a view to make the remedy meaningful also the principles of natural justice should be read. It was submitted on behalf of the petitioners that the principles of natural justice should also be read to the extent of giving opportunity of hearing because the Bank has to determine the amount due and has also to take the action on the basis of the alleged default.

45. On the other hand, on behalf of the respondent Banks, the learned Counsel had submitted that the decision of the Banks for enforcement of the security interest as provided under Sections 13(1) and (2), is essentially administrative decision of the Banks and, therefore, there is no question of observing the principles of natural justice. It was also submitted that in any case the remedy is provided after the action is taken as per Section 17 and, therefore, there is no question of application of principles of natural justice since post action opportunity is given under Section 17.

It was also submitted that the intention of the legislature is apparent because if the Bank wants to take possession of any secured assets as per Section 14 of the Act, the Chief Judicial Magistrate or the District Magistrate has to accept the request because the language used is "shall" and the action of Chief Metropolitan Magistrate or District Magistrate shall not be called in question in any Court or authority.

46. The plain and simple reading of Section 13(1) of the Act provides that any security interest created in favour of any secured creditor, "may" be enforced without the intervention of the Court or Tribunal by such creditor in accordance with the provisions of the Act. Section 13(2) further provides that if any borrower makes any default in payment of secured debts or any instalments thereof and such debt is classified by secured creditors as non-performing assets, then the secured creditor may require the borrower, by notice in writing, to discharge his full liability to secured creditor within 60 days from the date of notice, failing which the secured creditor shall be entitled to exercise all or any of the rights under Sub-section (4). Section 13(3) provides that notice shall give the details of the amount payable by the borrower and the secured assets intended to be enforced by the secured creditor in the event of non-payment of secured debts by the borrower. Section 13(4) provides that in case the borrower fails to discharge his liability in full within the period specified in Sub-section (2), the secured creditor may take recourse to one or more of the measures. The pertinent aspect required to be taken note of is that under Sub-section(1), (2), (3), and (4) the language used is "may". In exercise of the power conferred by Sub-section (1) of Clause (b) of Section 2 of Section 38 of "the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Ordinance, 2002"(hereinafter referred to as "the Ordinance"), the Central Government has framed the rules known the Security Interests (Enforcement) Rules, 2002 (hereinafter referred to as the "Rules"), providing the procedure for enforcement of security interest in secured assets. Rule 2(b) provides for definition of demand notices as notice in writing issued by secured creditor or by the authorised officer, as the case may be, to any borrower pursuant to Sub-section (2) of Section 13. As per Section 42 (2) of the present Act, though the said Ordinance is repealed, but anything done under the said Ordinance is deemed to have been done under the corresponding provisions of this Act and, therefore, it can reasonably be construed that the aforesaid Rules

shall continue to operate unless new Rules are framed. Rule 3 provides for mode of serving demand notice including that if there are more than one borrower, the demand notice shall be served on each borrower. Rule 4 provides for procedure to be followed after the issuance of the notice which, inter alia, provides for the mode and manner of taking possession of the property under Section 13(4) of the Act. Rule 5 provides for obtaining value of moveable secured assets and to fix the reserved price. Rule 6 provides for the mode and manner of sale of moveable secured assets. Rule 7 provides for issuance of sale certificate in respect to moveable secured assets. Rule 8 provides for sale of immoveable secured assets including the manner and procedure to be followed for sale of immoveable property. Rule 9 provides for time of sale, issue of sale certificate and delivery of possession etc., of the immoveable property and various steps to be taken for such purpose. Rule 10 provides for appointment of the Manager in consultation with the borrower to manage the secured assets, the possession of which has been taken over by the secured creditors and Rule 11 provides for procedure for recovery of short-fall of the secured debts, under Section 13(10) of the Act for making applications to DRT, under the provisions of Recovery of Debts Due to Banks and Financial Institutions Act, 1993.

47. It is well settled that normally when any power is vested by any statute upon any authority or persons under the Act and if such power is coupled with public duty and even if it is not expressly provided by the statute, it should be read with the principles of natural justice. Therefore, for the application of the settled legal position, the requirements are; (i) there should be a conferment of power; (ii) such power should have been vested in any authority and (iii) the character of power should be coupled with public duty. If the provisions of the present Act are examined in the aforesaid context, as observed earlier, whenever there is a default in payment of the instalment as per the agreement, the right to recover mortgage money accrues to the secured creditors. The present Act, as observed earlier, provides for an additional mode of recovery of mortgage money by enforcement of security. As per the present Act also for resorting to the remedy under the Act for enforcement of the security, there should be default of payment by the borrower and the debts of such borrower who is in default, must have been classified as non-performing assets. Therefore, on a plain reading of Sub-section (1), (2), (3) and (4) of Section 13, it appears that there is additional right given to the secured creditors

for enforcement of security interest. As such by the present Act a remedial measure is provided giving right to the Bank of enforcement of security. Even if such right is treated as power by giving lenient interpretation, then also it cannot be said that the secured creditors are acting as quasi-judicial authority or authority, where any rights, inter se, are to be decided between the parties. When any loan is given or money is borrowed by the borrower from the creditor, there is legal obligation for the borrower to repay and there is legal right given to the creditor to recover the amount in case the money is not paid as per the agreement and there is a default in repayment. As observed earlier, in case of the default, by the present Act, one of the additional modes of recovery of mortgage money is provided and, therefore, resorting to the remedy provided by the present Act for enforcement of the security interest would essentially be a decision of the Bank as secured creditor. At the most it can be termed as a business decision or administrative decision while rendering banking business by any financial institutions.

48. In the case of "Alka Ceramics vs. Gujarat State Financial Corporation and Ors.", reported in 1990(1) GLR, 628, the Division Bench of this Court, while examining the constitutional validity of Sections 29 and 31 of the State Financial Corporations Act, 1951 had an occasion to consider the question as to whether the Financial Corporation, while resorting to the remedy under Section 29 of the State Financial Corporations Act for recovery of its dues which is a remedy provided in addition to and not in derogation to any other law for the time being in force, is acting as exercising quasi-judicial function or not. The Division Bench of this Court, at para 12, observed, inter alia, and the relevant portion reads as under:

> "It would, thus, be clear that when Corporation decides to resort to Sec. 29 of the Act and takes any action under that section, it is not entering upon any adjudicatory or quasi judicial function. It is a decision by a party to the agreement as to what kind of steps for speedy recovery should be taken and whether the assistance of the Court is necessary. Just as a mortgagee under Sec. 69 of the Transfer of Property Act can take a decision to proceed under Sec. 69 and if he finds any difficulty in proceeding without the assistance of the Court, it may take a decision to go to a Court of Law. But it is the decision of a party to the

agreement and at that stage, no quasi judicial function is involved. Similarly, when the Corporation takes its administrative decision as to the course of action to be taken and followed, it is not exercising any quasi judicial function."

The Division Bench further also observed at para 18 as under:

"It is, thus, clear that even though the decision of the Corporation under Sec. 29 is not a quasi judicial decision, but is an administrative section, nonetheless, a reasonable reading of Sec. 29 does not exclude the principle of fair play and some element of natural justice. It need not be an elaborate procedure of personal hearing, exchange of pleadings, leading of evidence, cross examination of witnesses. It need not even be a regular show cause notice, but a notice to the party bringing to its notice the default position and the consequences following there from of inviting action under Sec.29 of the Act has to be given so that the party has reasonable time and opportunity to explain, reply or comply with the same. After considering the response, if any, from the party, it is open to the Corporation to arrive at its own decision. The party may point out in reply about the default position and/or may offer substantial part payment and offer reschedulement of repayment supported by its financial working and cash flow for the past period as well as, as projected in future. If the Corporation is satisfied that the debtor has been bona fide, trust-worthy and creditworthy and because of genuine difficulties, it wants reasonable reschedulement after substantial part payment, the Corporation will consider the same in accordance with its policy of encouraging and assisting the industrial growth of viable industrial units and if the Corporation is of the opinion that the industrial unit does not fulfil its policy requirement, the Corporation may proceed further under Sec. 29 in accordance with law, but in that case, it would be acting fairly, reasonably and in accordance with the principles of natural justice and not arbitrarily."

49. In the case of "Haryana Financial Corporation and Another v. Jagdamba Oil Mills and Another", reported in

2002(3) SCC, 496, the Apex Court at para 15, while considering its earlier view in "Mahesh Chandra case", observed that if the guidelines as indicated in "Mahesh Chandra" are to be strictly followed, it would be giving premium to dishonest borrower. It further observed as under:

> "It would not further the interest of any Corporation and consequently of the industrial undertakings intending to avail financial assistance. It would only provide an unwarranted opportunity to the defaulter (in most cases chronic and deliberate) to stall recovery proceedings. It is not to be understood that in every case the Corporations shall take recourse to action under Section 29. Procedure to be followed, needless to say, has to be observed. If any reason is indicated or cause shown for the default, the same has to be considered in its proper perspective and a conscious decision has to be taken as to whether action under Section 29 of the Act is called for. Thereafter, the modalities for disposal of seized unit have to be worked out. The view expressed in Gem Cap case appears to be more in line with the legislative intent. Indulgence shown to chronic defaulter would amount to flogging a dead horse without any conceivable result being expected."

Therefore, such powers are essentially of the administrative character as a bank or a financial institutions and the decision for such purpose would be based on sound business skill as institution rendering financial assistance to the public at large keeping in view the binding policy or instructions of the decision of the government or Reserve Bank of India, as the case may be.

50. It was rightly submitted on behalf of the respondent Banks that if monies are not recovered by realisation security interest, the Banks would be unable to return money to its depositors, who have invested money in the Banks with faith that the money is safe and as and when required, the same can be withdrawn by the depositors or would be repaid as and when it becomes due. If the Banks fail to enforce the obligation against its borrowers, the consequences would be that the petitioners would fail to discharge its obligation qua its depositors and account-holders. Therefore, it is expected that all banks could take all necessary and effective steps for enforcement of the obligation against those persons who

have borrowed money and if there is any default, remedies are resorted to for realisation of its security interest.

51. The aforesaid does not mean that the banks should behave like un-scrupulous money lenders. What is expected from any financial institutions or bank is that it should act and take steps as wise creditor keeping every time in mind that it has to discharge its obligation qua its depositors and account-holders and also it has to discharge its functions for rendering financial assistance to fresh entrepreneurs or new borrowers, which can be done only if the obligations against the existing borrowers are enforced in time by recovering the outstanding dues. Therefore, the right given to the banks for enforcement of the security as secured creditors cannot be equated with any authority exercising power as quasi-judicial authority. Therefore, the contention raised on behalf of the petitioners that the bank is made as the judge of its own cause is meritless and deserves to be dismissed. As such the bank is given right as remedial measure for enforcement of the security interest and the remedy is provided under Section 17 of the Act of challenging the action of the Bank before the DRT and a further appeal to Appellate Tribunal as per Section 18. Such remedy of appeal and further appeal are to the extent that if the Tribunal or the Appellate Tribunal holds that the possession of the secured assets is wrongfully taken, the possession may be returned and payment of compensation and costs can also be ordered. Therefore, merely because remedy is provided after the measures are taken by the bank under Section 13(4) of the Act, it cannot be construed that right given to the bank must be read with all requirements of following principles of natural justice.

52. Therefore, the aforesaid calls for examination also of the question on the part of the bank to resort to remedy of enforcement of the security interest in secured assets as per the provisions of the Act. It is well settled that in any civilized society, nobody should allowed to create a situation which disturbs law and order in the society. When the secured creditors are taking measures to take possession of the secured assets it can be said that it results into the consequences which may be of deprivation of the possession of the property, closure of the unit and other measures as provided under Section 13(4) of the Act. Therefore, what is minimum expected is a fair play action on the part of the secured creditors under the Act. The first steps towards fairness is already provided by the statute as per Section 13(2) of the Act namely; for requiring

borrower by notice in writing to discharge in full his liability to the secured creditors and a further step of providing 60 days' time from the date of notice. Therefore, opportunity is provided by the legislature itself to the borrower of notice and of giving 60 days to discharge the liabilities in full. Under Section 13(2) the language used by the legislature is entitling the secured creditors to exercise all or any of the rights under Sub-section (4) and, therefore, the borrower can pay up the outstanding debts and discharge himself from his liabilities to the secured creditors within 60 days from the notice or alternatively the borrower may suitably reply to the notice, if no default is committed by him in repayment of the secured debts or in instalments thereof or if the debt of his account is not classified or not classifiable as non-performing assets as per guidelines of RBI. If the borrower fails to give any reply to the notice and also fails to discharge himself from his liabilities to the secured creditors, the Bank or the secured creditors would be justified in proceeding for exercise of all or any of the rights under Section 13(4) of the Act. However, if the reply is given by the borrower, then in that case, it would be necessary for the secured creditor to consider the reply and to confirm as to whether there is any default in repayment of secured debts or any instalment thereof and whether such debt is classified as non-performing assets as per RBI guidelines. If the aforesaid conditions precedent are satisfied, then in that case the secured creditor shall be entitled to exercise all or any of the rights under Sub-section (4), but that does not mean that the secured creditor must exercise all or any of the rights under Sub-section (4), because the language used under Sub-sections (1), (2), (3) and (4) is that the secured creditors "may". It will be for the secured creditor to apply its banking business wisdom keeping in view any other prohibitory or mandatory guidelines, if any, issued by RBI and then to exercise the rights under Section 13(4) of the Act. In a given case, the borrower may pay up a substantial or sizeable amount of about 75% for discharging his liabilities and may seek time or in a given case the borrower may pay up the full amount of the valuation of the property or in a given case borrower may make a good and more viable offer by strengthening security interest of the secured creditor, may be by offering other security assets or otherwise. There cannot be any exhaustive list for various contingencies, but suffice it to say that it would be for the bank or secured creditor to consider the response or reply of the borrower within the aforesaid period of 60 days and thereafter if the bank finds that the offer made by the

borrower cannot be accepted then the bank may communicate the borrower accordingly, but that does not mean that the bank is required to pass a reasoned order by dealing with each and every contentions or offer made by the borrower, but fair play action in normal circumstances would require the Bank or secured creditor to communicate the borrower only the main reason for not accepting the offer or response or reply of the borrower and then to act as a wise creditor dealing in banking business and to take decision as to whether it should exercise all or any of the rights under Sub-section 4 of Section 13 of the Act or not, but such administrative wisdom of the financial institutions as secured creditor would not be subject to judicial scrutiny before any forum unless the action of the bank is so perverse or is prohibited by guidelines of RBI or prohibited by any competent authority having jurisdiction with it to prohibit the bank from exercising its rights under Section 13(4) of the Act. In a given case if the bank or secured creditor finds that if reply or intimation is given the borrower may transfer the possession of the secured assets or frustrate the action under Section 13(4) or there are extraordinary and exceptional circumstances, then under such situation bank or secured creditor may not or may not even be required to reply or intimate to the borrower. Suffice it to say that in normal circumstances the bank or secured creditor shall give reply or intimation to the borrower, and the same is mainly to give opportunity to make payment of defaulted amount as the bank may find it proper keeping in view of its banking business wisdom. The language used by the legislature in Sub-sections (1), (2), (3), and (4), as observed earlier, is "may" and, therefore, such secured creditors cannot exercise the rights under Sub-section (4), if there is any binding decision on facts of any competent forum or authority or competent Court. Therefore, if prior to the Act, suits for recovery of outstanding amount are filed before the forum available under any other law for the time being in force and there is a judicial decision that the creditor/bank is not entitled to recover any outstanding amount or is entitled to only a particular amount, then in those cases such judgement of the competent Court shall continue to be having binding effect to the secured creditor and the rights given under the Act cannot be read as nullifying the effect of a binding decision of a competent Court or forum. That does not mean that if the suits or the recovery proceedings under any other law for the time being in force are dismissed on technical aspects, but not on facts or without examining the legality and validity of the transactions of mortgage or security interest created or without examination of the facts for

actual amount of outstanding, the secured creditor cannot take recourse to the present Act, but it would vary from facts to facts of each case.

53. The attempt was made by the learned Counsel appearing for the Cooperative Banks to submit that even if the appeal is pending before the Appellate Forum and interim injunction is granted by the Appellate Forum against the execution of a decree or award of fulfillment of certain conditions and even if such conditions are complied with and the stay against the execution of decree or award operates, the bank or the secured creditor can resort to remedies under the present Act in view of Section 34 read with Section 35 of the Act. As such, on a plain and simple reading of Section 34 and Section 35 would not amount to nullify the effect of any binding judgement or order of the competent forum operating against the bank in taking steps for recovery of outstanding dues, but it will be for the secured creditors to move appropriate forum, Court or authority, where the matter is pending to get such clarification and it will be for such forum, Court, or authority to examine the facts of each case and to take decision in accordance with law and, therefore, there is no substance in the contention that even if there is a binding judgement or order of a competent forum, Court or authority, as the case may be, prohibiting the secured creditors from realising the security interest, may be by stay against execution of decree/award/recovery certificate, the secured creditors can resort to the provisions of enforcement of security as provided under Section 13 of the Act.

54. It may be recalled that at the time of dealing with the contention on the doctrine of election and on the rule that a person cannot be allowed to approbate and reprobate at the same time, it was observed that resorting to simultaneous remedy qua secured assets shall be dealt with hereinafter and, therefore, in that context keeping in view the principles of minimum fair place action matter deserves to be examined qua secured assets. Normally the Courts, while interpreting any provisions of the statute will make an attempt to reconcile the situation, so that chances of creation of conflicting situation amongst two statutes can be avoided. As observed earlier, as such normal law providing for recovery of outstanding dues under any other law for the time being in force is a wider remedy than the remedy provided under the present Act for enforcement of the security interest in secured property. So far as recovery of the debts as per the provisions of Debts Due

to Banks and Financial Institutions Act, 1993 is concerned, even if the banks and financial institutions under the Act of 1993 (other than Cooperative Banks) are to initiate the action for recovery of the outstanding dues against the borrower, the same would be before the DRT under the same Act of 1993 and, therefore, there is one forum adjudicating rights of the banks as creditors as well as secured creditors in case the bank takes action under Section 13(4) of the Act and the borrower is to approach by preferring appeal under Section 17 of the Act. However, such may not be the case qua Co-op banks who are normally filing suits for recovery by raising dispute as per Section 96 of the Gujarat Coop Societies Act (hereinafter referred to as the "Act, 1961") before the Registrars' Board of Nominee. Even for Coop Banks registered under "Multi-State Co-operative Societies Act, 1984, the power of the adjudicating dispute are assigned to State Registrars' Board of Nominee and, therefore, their position is also more or less at par with other Cooperative Banks. It has become necessary to examine the aforesaid aspect, because in the present group of petitions, some of the respondent Banks are Coop Banks registered as Coop Societies under the Act, 1961 or under Multi-State Co-operative Societies Act, 1984. It is not necessary to examine at this stage on the question as to whether the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 can be made applicable to Coop Banks registered under the Act, 1961 or under Multi-State Cooperative Societies Act. It may be that such Coop Banks in a given case, even if they are assumed as covered under the Act, 1993 may not resort to proceedings before the DRT for various reasons, may be on account of quantum of court-fees to be paid, forum of appeal, the method and manner applied for summary suit being preferred by Coop Banks under the Act, 1961 and various other reasons which may be rather known to such Coop Banks. But, as on today, such Coop Banks are resorting to the provisions of the Act, 1961 by raising dispute under Section 96 and their cases are there in this group of petitions where there is either award of learned Board of Nominee whose execution proceedings are going on or the appeal is pending before the forum as per Act of 1961 between such Co-op. Banks and the borrowers. Therefore, the result and the effect would that though there may be wider remedy provided under any other law for the time being in force for the recovery of outstanding dues of the banks or secured creditors or Coop banks, it is not necessary that the forum adjudicating such wider remedy would be the same as that of entertaining and deciding the appeal under Section 17 of the present Act. Under such circumstances attempt will have to be made to

reconcile the situation in such a manner which may not result into either conflicting decisions of two competent forums or different binding decisions governing rights of the parties qua secured assets. So long as the forum under any other law for the time being in force is adjudicating upon the dispute is the same and is rendering the decision on the points or touching the rights of the creditor or borrower qua other than that of secured assets as such there is no question of any conflict, because such rights of the parties governed by the order or judgement or award to that extent is operating in absolute, since the remedy provided under the present Act is only qua secured assets. Such conflicts of decision by DRT vis-a-vis the decision of the forum under any other law for the time being in force may operate qua the rights of the secured creditors in respect to secured assets. Therefore, when bank or secured creditor has to resort to the proceedings under Section 13 of the present Act, it will have to take into consideration the proceedings before any competent forum under any other law for the time being in force to the extent it touches the rights of the creditor qua secured assets. As observed earlier, if there is any prohibitor order of any competent forum under any other law for the time being in force, either prior to enactment of the present Act or thereafter and such prohibitory order is of prohibiting the bank from realisation of debt or money by enforcement of security interest, then in such circumstances, it would be unfair on the part of the secured creditor to resort to the remedy under Section 13 of the Act, unless and until such prohibitory order is clarified, vacated or set aside by higher forum known to law. If there is no express prohibitory order of any competent forum under any other law for the time being in force the secured creditor may be justified in proceeding for resorting to the remedies provided under Section 13 of the present Act. Similarly, if simultaneous remedies are resorted to under any other law for the time being in force as well as under the present Act before the same forum or before different forums, then in that case qua secured assets is concerned, if the recovery is already affected and money is realised in either of the proceedings the fair place action does require that such realisation of money shall be duly given credit of in another proceedings. In a situation, where proceedings are pending before the competent forum under any other law for the time being in force and the bank also resorts to remedy provided under Section 13 of the present Act, then the fair play action and the basic principles of rule of law and justice does require that qua very secured assets, the proceedings before other forum under

any other law for the time being in force are stayed to the extent and only relating to secured assets and it may continue on other aspects and qua the rights of the parties other than that of secured assets. Of course, it would be for the other side (borrower) to move for such application and the competent forum under any other law for the time being in force may appropriately examine the matter in accordance with law, but if such situation is not reconciled, it may result into two conflicting decisions of two competent forums governing the rights of the parties qua secured assets and it may also result into absurd and perverse results which can never be the intention of the legislature while providing the additional remedies to the secured creditors as per the present Act.

55. Further the rights of the bank under Sub-sections (1), (2), (3), and (4) of Section 13 cannot be read as creating lawlessness situation, but should and must be preserved by maintaining rule of law and not allowing the disturbances of law and order situation. In a given case, the borrower may respect the right of the bank/secured creditor and may also allow the secured creditor or authorised person as per the rules to take possession of secured assets, but such rights of secured creditors cannot be read as giving authority or power to the bank or secured creditor to apply force of muscle power for taking measures under Section 13(4) of the Act. In such circumstances, in a given case, where the secured creditor finds it difficult to take measures under Section 13(4) of the Act against the secured assets, it would be for the secured creditors to resort to the provisions of Section 14 of the present Act by making request in writing to the Chief Metropolitan Magistrate or District Magistrate within whose jurisdiction any such secured assets or such documents relating thereto may be situated or are found to be in possession thereof and the mandate of Section 14 thus provides that the Chief Metropolitan Magistrate or District Magistrate shall upon such request to take possession of such assets and documents relating thereto and forward such assets and documents to secured creditors and it is only at the stage where the Chief Metropolitan Magistrate or the District Magistrate has to take possession, use of force for getting possession as per Section 14(2), as may be required can be applied.

56. Therefore, the above minimum observance of fair play action and some element of natural justice would be required to be followed on the part of the secured creditor resorting to the remedies provided under Section

13 of the Act for enforcement of the security interest qua secured assets prior to measures under Section 13(4) of the Act and not full-fledged observance of principles of natural justice as sought to be canvassed on behalf of the petitioners as that of giving opportunity of hearing to the borrower by the Bank in every case and as that of passing a speaking order by dealing with each and every aspect of the case or contentions raised by the borrower in reply to the notice.

Reliance was placed by the learned Counsel appearing for the petitioners upon the decision of the Apex Court in the case of "S.K.Bargava v. Collector, Chandigarh and Others" reported in 1998(5) SCC, 170 for contending that principles of natural justice with its full span should be read before the Bank takes action under Section 13(4)_ of the Act. In the case of "S.K.Bargava"(supra) the Apex Court, in view of the language of Section 3 providing for the words "sum due" interpreted that no such determination of the "sum dues" cannot be taken place without the notice of the defaulter, whereas such is not the case, nor such language is used by the legislature in the present Act under Sub-section (1), (2), (3) and (4) of Section 13 of the Act and, therefore, the reliance placed is ill-founded.

57. In any case, what shall be the scope and ambit of the observance of the principles of natural justice would vary from case to case and would depend upon the inbuilt scheme and mechanism under a particular statute. As such, the judicial review of the action of the bank is otherwise provided by the legislature after the measures taken under Section 13(4) of the Act by providing appeal to the DRT and thereafter second appeal to Appellate Tribunal. Such provisions of post action remedy under the law provided by the statute is not unknown to law. Further, as observed earlier, remedy provided under Section 17 of the Act is wide and efficacious, not only for restoration of the possession, but also for awarding compensation and the costs as may be determined by the Tribunal or Appellate Tribunal. When the Act itself provides for in-built mechanism for measures to be taken by the secured creditor for enforcement of the security interest and for protecting the rights of the borrower in case the borrower is wrongfully dispossessed, such remedy as provided under the Act as per Section 17, 18, and 19 of the Act can be said to be an efficacious alternative remedy under the present Act. It is also well settled that normally this Court, while exercising power under Article 226 of the Constitution of India would not

entertain a petition by way of self-imposed restriction if there is already an alternative efficacious remedy available to the petitioners.

58. The attempt was made to submit that there is no remedy provided under the Act before bank takes action under Section 13(4) of the Act and, therefore, the petitioners have no option, but to approach this Court by preferring a petition under Article 226 of the Constitution of India. It was also submitted on behalf of the petitioners that in view of Section 34 of the Act, Civil Court has no jurisdiction to entertain any suit and the proceedings in respect to the matter which is empowered under the Act to DRT or Appellate Tribunal and no injunction shall be granted by any Court or authority in respect of any action taken or to be taken in pursuance of power conferred by or under this Act or under the Act of 1993.

59. On behalf of the respondent Banks, more particularly those banks which are not nationalized banks, it was also contended that they are not the instrumentality of the State within the meaning of Article 12 of the Constitution of India and, therefore, the petition under Article 226 of the Constitution of India against such banks which are not nationalized banks cannot be maintained.

60. It is true that the jurisdiction of Civil Court is expressly ousted by Section 34 of the Act and it is also construed that the legislature has given mandate to any Court or authority not to give injunction in respect of any action to be taken or to be taken in pursuance of the power conferred by or under this Act or under the Act of 1993, but as per the settled legal position, if there is inherent lack of right or power with the bank or secured creditor the action for resorting to the remedy under the alleged right or power under those circumstances can be said to be ultra vires the provisions of the Act. As observed earlier, even if the rights of the secured creditors are read as power conferred by or under this Act, then also what is expected for the secured creditor is only minimum fair play action and not the principles of natural justice as sought to be canvassed on behalf of the petitioners. The scope of Article 226 is wider than that of Article 32 of the Constitution of India. The jurisdiction of Supreme Court under Article 32 can be invoked only if there is a breach of fundamental rights and fundamental rights can only be enforced on those bodies which are covered by Article 12 of the Constitution of India. So far as

Article 226 is concerned, the writ can be issued even for the purpose of rights which are not fundamental. As provided under Article 226, writ can be issued to any person and for any other purpose. Therefore, the language Article 226 is in larger and wider terminology. In the case of "Anadi Mukta Sadguru Shree Muktajeevandas Swami Suvarna Jayanti Mahotsav Smarak Trust & Ors. v. V.R.Rudani & Ors." reported in 1989(2) GLR, 1357 (SC), the Apex Court has held that writ of mandamus under Article 226 of Constitution is not confined to statutory authorities and instrumentalities of the State only, but it can also be issued to any other persons or authority performing public duty and that such duty need not be imposed by the State Government. At para 20, the Apex Court has, in "Anadi Mukta Sadguru"(supra), observed as under:

> "20. The term "authority" used in Art. 226, in the context must receive a liberal meaning unlike the term in Art. 12. Article 12 is relevant only for the purpose of enforcement of fundamental rights under Art. 32. Article 226 confers power on the High Courts to issue writs or enforcement of the fundamental rights as well as non-fundamental rights. The words "any person or authority" used in Art. 226 are, therefore, not to be confined only to statutory authorities and instrumentalities of the State. They may cover any other person or body performing public duty. The form of the body covered is not very much relevant. What is relevant is the nature of the duty imposed on the body. The duty must be judged in the light of positive obligation owned by the person or authority to the affected party. No matter by what means the duty is imposed, if a positive obligation exists mandamus cannot be denied."

61. This Court in the case of "Arvindbhai Mulubhai Bhutaiya & Ors. v. Amreli District Central Co-op. Bank Ltd. & Anr.", reported in 1998(2) GLR, 1740, in respect to Cooperative Bank, had an occasion to consider that even though a Cooperative Bank is not an instrumentality of the State within the meaning of Article 12 of the Constitution of India, the Cooperative Bank is discharging public duty or obligation and not the private duty, when the obligation is created by the statute as an employer. Ultimately, view taken by this Court is that when an obligation is created under a standing order in a Cooperative Bank as an employer and if it is breached or is not followed, it results into breach of public duty

and, therefore, the writ can be issued.

62. The words "public duty" normally can be interpreted in contra distinction to the words "private duty". The "private duty" is such which is created by contract or agreement or customary right or otherwise, whereas "public duty" would be a duty cast upon any person by a statute. If the statute is to govern the rights of the private parties, inter se, only it may not result into "public duty", but if it is to result into giving certain rights and obligations and also provides for method and manner of exercise of such rights and obligations and if the character of such statute is to affect a large class of people, may be as beneficiaries to be affected by such statute and if the duty is conferred by such statue, it can be terms as a "public duty" or obligation. In that line, if the provisions of the present Act are examined, the powers of resorting to the remedial measures are given to only certain class of secured creditors and not to all secured creditors. The act as mentioned in the title, thus, is to regulate securitisation and reconstructions of financial assets and enforcement of security interest. Such regulation of securitisation and reconstruction and enforcement of security interest is meant for creating public duty. Further, Chapter II of the Act provides for regulation of securitisation and reconstruction of financial assets of the bank and financial institutions. Section 12 of the Act provides for the power of RBI to determine the policy and give directions in the matter of securitisation in the public interest or to regulate the financial system of the country or to prevent the affairs of any securitisation company or reconstruction company from being conducted in a manner detrimental to the interest of investors. Chapter III provides for enforcement of the security interests. Even the secured creditors, while exercising power under Section 13 for enforcement of the security interests, has to act as per Security Interest (Enforcement) Rules, 2002 and the language of the rule at the appropriate stage is creating an obligation and the right to be performed only by a particular manner and in a particular way and even the mode of disposal of the moveable as well as immoveable property provided under the Rules by the secured creditors for realisation of money by sale are creating an obligation upon a secured creditors or authorised officer of the secured creditors to follow a particular procedure for disposal of the properties. The action of the secured creditors under Section 13(4) is made subject to appeal under Sections 17 and 18 of the Act. Chapter IV provides for the manner of regulating the registration

of transaction of securitisation and reconstruction of financial assets and creation of security interests. Chapter V provides for offence and penalties which, inter alia, provides that if any securitisation company or reconstruction company fails to comply with the directions of the RBI, it shall be punishable with the fine, which may extend to Rs.5,00,000/= (Rupees five lacs only) and in the case of a continuing offence, with an additional fine which may extend to Rs.10,000/= for every day during which the default continues. Section 29 of the Act provides that if any person contravenes or attempts to contravene or abets the contravention of the provisions of this Act or of any rules made thereunder, he shall be punishable with imprisonment for a term which may extend to one year, or with fine, or with both. Section 30 of the Act provides for trial of the offence punishable under this Act by Metropolitan Magistrate or a Judicial Magistrate of the First Class. The pertinent aspect of the case is that the Section 32 of the Act provides for protection of any action taken by any secured creditor or any officer or manager for anything done or omitted to be done in good faith under this Act. Such provisions would normally not be there in a statute, where there is creation of, inter se, only private duty. Similarly, Section 34 of the Act also provides for a restriction over the power of the Civil Court to entertain the suit or proceedings or to grant injunction in respect of any action taken or to be taken. Section 38(2) provides for enabling power to the Central Government to make rules in the manner in which the rights of a secured creditor may be exercised by one or more of his officers under sub-section (12) of Section 13. Therefore, upon overall reading of the aforesaid provisions and other provisions of the Act, it appears that the Act creates statutory obligation upon a certain class of secured creditors, who are covered by the Act to exercise the power of creation of enforcement of security interest in a particular manner of this statute and the Act is enacted by the Parliament not only to enable the financial institutions and the banks to enforce security interests, but also to regulate security interest and its reconstruction keeping in view the larger interests of the investors and the public at large.

63. But such exercise of right or power conferred on the bank, may be nationalized bank or may be a private bank or financial institutions, which is not a State within the meaning of Article 12 of the Constitution would not be outside the jurisdiction of High Court under Article 226 of the Constitution of India, but as observed earlier, this Court, while exercising power under Article

226 of the Constitution of India would not substitute or interfere with the wisdom of the bank as secured creditor operating in the banking business, nor would this Court undertake judicial scrutiny of all the decisions of the bank for taking measures under Section 13(4) of the Act, unless and until the action of the Bank is perverse on the face of it or there is inherent lack of power with the secured creditor or unless such measures taken under Section 13(4) of the act are to result into absurd situation, which cannot be remedied by the forum provided under Section 17 or 18 read with the power under Section 19 of the Act. The rights given to the secured creditor to resorting to the remedy for enforcement of the security interest is having a statutory character with duty to act as per the Act and special protection against civil and criminal action for such actions under the Act and also the punishment if the provisions of the Act are contravened. Such characters of right or power are not conferred by any contractual relations between the parties and, therefore, it cannot be said that those secured creditors who are not nationalized banks are not amenable to the jurisdiction of this Court under Article 226 of the Constitution of India. On a conjoint reading of various provisions of 13, 14, 15 and 16 and others of the Act read with the aforesaid Security Interest Enforcement Rules 2002, it appears that the right conferred to a certain class of secured creditors by the present Act is having its statutory character and various provisions are made for the manner and method of exercising the right as remedial measures for recovering mortgage money are not only having statutory character, but the intention of the legislature appears to be that when such rights exercised by such secured creditor it shall be in the manner as provided under Section 13 read with Section 14 read with Section 15 and 16 of the statutory Rules made thereunder, so that not only the rights are conferred upon such secured creditor for enforcement of the security, but such rights are to be exercised for enforcement of the security interest as provided under the Act read with relevant Rules of 2002. Therefore, when any person, may be statutory body, having deep and pervasive control by the government or may be other class of secured creditors covered within the meaning of Financial Institutions, is exercising statutory rights and powers for enforcement of security it would fall within the scope power of this Court under Article 226 of the Constitution of India and, therefore, the contention that the banks which are not nationalized or financial institutions for which there is no deep and pervasive control of the Government are not amenable to the jurisdiction of this Court under Article 226 of the

Constitution of India cannot be accepted and hence rejected. As observed earlier, normally this Court while exercising power under Article 226 of the Constitution would not interfere in a matter where the Act itself provides for the remedy and such remedy is efficacious and alternative unless it results into creating a situation which cannot be remedied by the forum provided under Sections 17 and 18 of the Act read with the powers under Section 19.

64. Even if the petition is to be entertained under Article 226 of the Constitution of India against the Bank or financial institutions, the Court would be to take into consideration various factors including that the intention of the legislature to extend protection against sale of the property for which the measures are taken unless 75% of the default amount is deposited and not only that but even if the interim orders of the Apex Court is taken into consideration in the case of "M/s.Mardia Chemicals Ltd. & Anr. v. Union of India & Ors." in the W.P. (Civil) No. 541/2002, the Apex Court has expressly observed that the order would not preclude the secured creditors to take the recourse under Section 13(4) of the Ordinance (which is now the present Act) and, therefore, what is prohibited is only sale of the property and not the measures to be taken under Section 13(4) of the Act. Further as per the settled legal position the thing which cannot be done directly cannot be permitted to be done indirectly by invoking power under Article 226 of the Constitution of India, which is extraordinary, equitable and discretionary jurisdiction of this Court.

At this stage it would be worthwhile to end the discussion by abstracting certain observations of the Apex Court in the case of "A.P.STate Financial Corporation"(supra) at para 18 as under:

> "There is no equity in favour of defaulting parties, which may assist for interference by this Court in observing equitable extraordinary power under Article 226 of the Constitution of India. The aim of equity is to permit honest borrower and not to frustrate the legitimate right of the Corporation which takes steps to recover its dues from defaulting party."

65. Therefore, in view of the aforesaid observations and discussions, the conclusion is as under:

65.1 The present Act is enacted by the Parliament to

enable the Banks and Financial Institutions for recovery of its loans and for reducing the level of non-performing assets.

65.2 The impugned notification of the Central Government including the Coop Banks is intra vires the powers of the Central Government as delegated legislative power of the Parliament and such piece of subordinate legislation is legal and valid.

65.3 The provisions of the Act providing remedial measures for enforcement of security interest by secured creditors are having the character of procedural laws and it intends to cover up all transactions already entered into subject to the provisions of within the period of limitation and the defaults in making repayments and the assets already classified is non-performing assets and such future contingencies too.

65.4 The secured creditors under the present Act can resort to simultaneous remedies provided under any other law for the time being in force and also under the present Act, but such remedies under the present Act cannot be read as nullifying the effect of binding judgement of a competent Forum on facts qua such secured assets or quantification of outstanding amount or liability therefrom and simultaneously resorting to the remedies under the present Act in addition to the remedies under any other law for the time being in force qua secured assets should not result into frustrating the basic principles of justice and good conscience and rule of law as per the observations made in earlier paragraphs.

65.5 The element of principles of natural justice of fair play action, as observed in earlier paragraphs, would be required for taking measures under Section 13(4) of the Act by the secured creditors dealing in banking business and it would not be necessary to follow elaborate procedure of personal hearing, exchange of pleadings, leading of evidence, cross examination of witnesses, passing of reasoned order by dealing with all contentions etc., as the observance of full-fledged principles of natural justice.

65.6 All financial institutions covered by the Act

exercising statutory rights and the measures as provided under the present Act are amenable to jurisdiction of this Court under Article 226 of the Constitution of India, but as the present Act itself provides for efficacious alternative remedy by way of self-imposed restrictions, this Court would not entertain a petition challenging the action of the secured creditors of contemplating to undertake the measures as per the Section 13(4) of the Act unless the action is perverse on the face of it or it creates absurd result or situation which cannot be remedied by the forum provided under Sections 17, 18 read with the powers under Section 19 of the Act or there is inherent lack of right/power with the secured creditor.

66. In view of the aforesaid discussions, observations and conclusions, I am inclined to pass the following orders:

66.1 The prayer for challenging the constitutional validity of the provisions of the Act including the challenge attempted to be inserted by filing applications for amendment in the main Special Civil Application cannot be entertained and rejected accordingly and the applications for such amendment made by the concerned petitioners shall stand dismissed.

66.2 The challenge made by the concerned petitioners to the legality and validity of the notification dated 28-1-2003 issued by the Central Government for specifying "Cooperative Bank" as "Bank" for the purpose of the Act also fails and the petitions shall stand dismissed to that extent.

66.3 The petitioners, who have challenged the action of the Banks of issuing notice under Section 13(2) of the Act, but no reply to the notice is given by the concerned borrowers, the Bank as such would be justified in taking measures under Section 13(4) of the Act, however, since the matters were pending before this Court, in the interest of justice, such petitioners may submit reply within a period of 15 days from today to the concerned bank/financial institution/the secured creditor, in light of the observations made by this Court in earlier paragraphs of this Judgement/Order and if such reply is submitted, the bank/financial institution shall consider the

same, keeping in view the observations made in this judgement/order and thereafter may take steps in accordance with law.

66.4 In the cases in which petitioners have challenged the action of the bank of issuing notice under Section 13(2) of the Act, after submitting reply or reply being submitted pending the petition, the bank shall consider the matter keeping in view the observations made by this Court in this judgement/order and thereafter may take steps in accordance with law.

66.5 The petitioners who have approached this Court after the measures are taken by the secured creditor under Section 13(4) of the Act, their challenge is not entertained in view of the alternative remedy provided under Section 17 of the Act, those petitions shall stand dismissed, to that extent with the observations that it would be open to such petitioners to prefer appeal under the present Act, in accordance with law.

66.6 The challenge to the action of notice by the secured creditor under Section 13(2) of the Act by the petitioners on the ground that there are simultaneous proceedings pending before either DRT or before the Registrars' Board of Nominee or before Gujarat State Coop. Tribunal or Appellate Forum or Higher Forum under any other law for the time being in force, shall stand rejected, save and except the observations made in this judgement/order.

66.7 The petitions, in which the petitioners who have challenged the action of the Bank under Section 13(2) of the Act on the ground that there is a binding decision of DRT or its Appellate Forum or Registrars' Board of Nominee or Tribunal on facts holding that the Bank would be entitled to a particular amount, shall stand allowed to the extent that the Bank shall be entitled to recover the amount even under the present Act as adjudicated and determined by the competent Forum under any other law for the time being in force and not more than the amount adjudicated and decreed or awarded or recovery certificate issued. In case, the competent Forum has passed any prohibitory order against the Bank from recovering the money to the secured assets, such

order of the competent Forum shall operate as a bar to the secured creditor in proceeding under Section 13 of the Act, unless and until it is clarified or vacated by such competent Forum enabling the secured creditor to proceed under Section 13 of the Act for enforcement of the Secured Assets. It is also clarified that it would be open to the secured creditor to move appropriate competent Forum for such clarification or for vacating of such prohibitory order and if such application is made by the secured creditor, the competent Forum shall render the decision in accordance with law as early as possible, preferably within a period of 60 days from the date of making such applications by the secured creditor.

66.8 The petitioners who have challenged the action of the Bank under Section 13(2) of the Act on the ground that the conditions precedent of default or classifying the debt as non-performing assets are not satisfied, will be entitled to submit reply to the Bank within 15 days from today pointing out such aspects and the Bank shall examine and confirm as to whether the conditions precedent are satisfied or not and, if yes, then it would be open to the Bank for taking measures under Section 13(4) of the Act. However, it is clarified that if the Bank finds that the conditions precedent are not satisfied, it would not be open to the Bank to proceed for taking measures under Section 13(4) of the Act, without prejudice to the rights of the bank to recover money as per any other law for the time being in force.

66.9 Similar shall be the direction as per para 66.8 in respect of the petitioners who have challenged the action of the Bank under Section 13(2) of the Act on the ground that the property is not mortgaged at all. The Bank shall examine the matter and verify as to whether the property is mortgaged or not and the Bank shall take action only thereafter and only if property is mortgaged. It would also be open to such petitioners to draw the attention of the bank by submitting reply or otherwise within 15 days from today.

66.10 The petitions in which the petitioners have challenged the action of the Bank under Section

13(2) of the Act on the ground that the proceedings before BIFR is pending shall stand allowed to the extent that the Bank shall not be entitled to take measures under Section 13(4) of the Act in secured asset or assets, unless express written permission is obtained of 75% of the secured creditors in such asset or assets, as the case may be, for taking measures under Section 13(4) of the Act qua such secured asset/assets.

66.11 The petitioners who have challenged the action of the Bank under the present Act, in capacity as guarantors of the loan transaction, either of notice under Section 13(2) or action under Section 13(4) of the Act, shall have the same right and liabilities as that of the borrower qua the aforesaid action of the Bank/Secured Creditors, as referred to in the earlier directions para No.66.1 to 66.10 and, therefore, the rights and liabilities of such petitioners and of secured creditors shall be governed accordingly.

67. The petitions in which rule is issued shall stand absolute to the aforesaid extent or shall stand discharged accordingly, as the case may be. The petitions in which notices are issued shall stand disposed of in terms of the observations, conclusions and the directions. The petitions in which no notice is issued shall stand disposed of with observations that it would be open to such petitioners to submit reply to the bank or the secured creditor within a period of 15 days from today by producing the copy of this judgement and order and if such reply is submitted, the bank or secured creditor shall consider the same in accordance with law keeping in view the observations in the judgement and thereafter may take steps in accordance with law. No cost.

30.7.2003 (Jayant Patel, J.)

FURTHER ORDER:

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After the pronouncement of the judgement, learned Counsel appearing for the petitioners requested that the ad-interim relief which was granted earlier may continue for a period of four weeks so as to enable the

petitioners to examine and decide as to whether the petitioners should resort to any further steps for challenging the judgement or for submitting the reply to the Bank. Some of the learned Counsel appearing for the petitioners also submitted that the stay was granted pending the petition in only certain matters and, therefore, the uniformity may be maintained.

The learned Counsel appearing for the Bank have objected to such request and they submitted that in large number of the matters though stay was not granted, the Bank, on its own, have not taken any further action.

Considering the facts and circumstances of the case, since 15 days time is already granted from today to the petitioners to submit reply to the Bank, the Bank would not take any action prior that to. So far as the petitioners who have already submitted reply to the Bank, the Bank would take a reasonable time for considering the reply. Still, however, the petitioners who have already filed reply may submit further reply, if they so choose, within a period of 15 days from today and the Bank shall consider the same and thereafter may take steps in accordance with law. Therefore, in any case, Bank shall not take steps prior to 15 days from today and consideration thereafter.

In view of the above, no further extension of interim relief is required, but the clarifications and observations made earlier shall continue to operate for the respective parties.

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submitted that pursuant to the interim order certain amounts are deposited by the concerned petitioners in the Bank and they are lying with the Office of this Court.

Under these circumstances, with the consent of the petitioners, the Bank may be permitted to withdraw the amount and if such request is made, Office shall pay the amount by "A/c payee" cheque to the concerned respondent Bank after verifying the consent of the concerned petitioner and necessary formalities for such purpose.

In view of the judgement passed in the main matters, no orders are required to be passed in interim applications and all interim applications are disposed of accordingly.

30-7-2003 (Jayant Patel, J.)

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